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**"CONFLICT BETWEEN THE AXIOM OF
UNIVERSAL JURISDICTION AND STATE
SOVEREIGNTY WITH REGARD TO
INTERNATIONAL CRIMES BY THE
HEAD(S) OF STATE(S): A STUDY WITH
REFERENCE TO IMMUNOLOGICAL
PROTECTIONS."**

**A THESIS SUBMITTED TO
SAURASHTRA UNIVERSITY, RAJKOT
FOR THE AWARD OF THE DEGREE OF**

Doctor of Philosophy

**IN
LAW**

Submitted by
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Under the Supervision of

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**FACULTY OF LAW
SAURASHTRA UNIVERSITY,
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DECLARATION

I hereby declare that this thesis entitled "**CONFLICT BETWEEN THE AXIOM OF UNIVERSAL JURISDICTION AND STATE SOVEREIGNTY WITH REGARD TO INTERNATIONAL CRIMES BY THE HEAD(S) OF STATE(S): A STUDY WITH REFERENCE TO IMMUNOLOGICAL PROTECTIONS.**" Which I am submitting for the award of Degree of Doctor of Philosophy in Law, to the Saurashtra University, Rajkot is an original research work done by me.

I also declare that this thesis or any part of it has not been submitted to this or any other University for the award of any Degree, Diploma or Fellowship.

Place: Rajkot

Date: 1/3/2012

(Rhishikesh Dave)

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CHAPTER 1

RESEARCH STUDY: PROBLEM, SCOPE AND METHODOLOGY

1.1 Research Problem

The horrifying experiences of the Armed Conflict in the Gulf, Vietnam, Somalia, Yugoslavia and Rwanda remind us of the war and the suffering, death and destruction it causes. War is against humanity and involves most brutal and arbitrary violence. The contemporary International Law - in particular the charter of the United Nations - prohibits not only the use of force but even the threat to use force with exception to the collective actions taken by the United Nations or the defensive measures permitted by Article 51 of the Charter. In order to make this prohibitions realistic international law offers to states a great scale of means and measures for the peaceful settlements of disputes with a view to an effective abolition of the recourse to war.

Unfortunately, the prohibition of war proclaimed after World War - II is not respected. The sad reality of today's International Relations is that armed conflicts continue spread and are not ready to disappear. The recourse to the armed force is accompanied by most heinous crimes such as Genocide, Rape, Enforced Prostitution Torture, Hostage taking summary executions, internment, deportation and intimidation. Armed conflicts completely bend twist, torture and put to the ground the mechanisms for the protection, and promotion of Human Rights.

The three core international crimes i. e. Genocide, Crimes against Humanity and War Crimes are expressly prohibited by International Law through adoption of serious of Conventions, and also by setting up of International Tribunals and International Criminal Court.

All these Conventions makes it mandatory for the parties to make these crimes punishable under the municipal laws. The concept of International

Jurisdiction for these crimes has also been established. In short these crimes have achieved *Jus Cogens* status under the Public International Law, and any individual who has perpetrated such crimes is punishable irrespective of his position in Government. Even the Heads of the States can be punished for such crimes according to International Criminal Law.

The conflict starts when it comes to punishing heads of state for the International Crimes. Two conflicting norms exist in International Law. The principle of sovereign immunity on one side and International Crimes on the other side. When a head of state perpetrates or orders, plan, abates perpetration of International Crimes, can he claim sovereign immunity for such acts under International Law?

There are conflicting decisions of various international Courts and Tribunals and also by various National Courts specially after the controversial decision of International Court of Justice in *Belgium v Congo* the debate has heated again. This conflict has to be resolved in order to deter head of states from perpetrating such heinous crimes.

1.2 Aims of Research

- 1.2.1 To study the meaning and definition of International Crimes.
- 1.2.2 To study the Legal Provisions under various International Instruments regarding punishment of individuals perpetrating International Crimes.
- 1.2.3 To study the concept of sovereign immunity i.e. immunity *ratione materiae* and immunity *Ratione Personae* under the International Law.
- 1.2.4 To study the conflict of various International Courts and Tribunals regarding sovereign immunity and International Crimes.
- 1.2.5 To study the various decisions of National Courts of different Countries regarding sovereign immunity vis-à-vis International Crimes.
- 1.2.6 To study the conflict of between international tribunals and ICC vis-à-vis National Courts exercising International Jurisdiction.

- 1.2.7 To examine whether existing Laws can eliminate the protection of sovereign immunity to the perpetrators of International Crimes.

1.3. Objective of Research

The objective of the research is to examine whether the principle of sovereign immunity overrules the norms of International Criminal Law and to examine the possible steps to be taken for elimination of such conflict.

1.4 Hypothetical Issues

- 1.4.1 What are International Crimes?
- 1.4.2 What is the Definition, elements and meaning of International Crimes i.e. genocide, crimes against humanity and War Crimes according to various International Instruments?
- 1.4.3 What are the general principles of criminal responsibility under International Criminal Law?
- 1.4.4 What is the concept of sovereign immunity under the International codified Law and International Customary Law?
- 1.4.5 What is the concept of Universal Jurisdiction under International Criminal Law?
What are the Princeton Principles of Universal Jurisdiction?
- 1.4.6 What is the conflict between the principles of Universal Jurisdiction and Sovereign Immunity?
4.6.1 What are the issues of Jurisdiction in cases of exercise of Universal Jurisdiction?
- 1.4.7 What is the position of International Tribunals and National Courts regarding the defence of sovereign immunity made by various heads of States?
- 1.4.8 What is the position of Sovereign immunity in today's age of Human Rights?
4.8.1 Case of General Augusto Pinochet

1.4.9 Whether there is a possible solution to this problem in existing International Law?

1.4.10 What changes are needed in contemporary International Law to eliminate this conflict of Law?

1.5. Scope of Study

The present study will examine in a broad perspective. The International Law and Municipal Laws of various countries with reference to punishment of International Crimes and sovereign immunity.

The study will be limited only to crimes, which are declared as International Crimes i.e. Genocide Crimes against Humanity and War Crimes.

The sovereign immunity will consider both personal immunity and material immunity provided to sovereigns of states.

1.6. Research Methodology

The research is based upon comparative and analytical study of various international and National Jurisprudence regarding International Criminal Laws and sovereign Immunity laws.

The study is based on Primary Laws, Reference Books, Court Decisions, Journals, Reports, Opinions of Legal Scholars and Statistics available on the subject of research.

1.7 Significance of Study

1.7.1 International Level

The study will ensure and deepen the analytical aspects of the subject and help international Tribunals and lawyers practicing International Criminal Law to solve the conflict of International Law. It will also help the International Community to develop International Criminal Law in order to eliminate gross human rights violations perpetrated by sovereigns of states.

1.7.2 The Study will help the legislature to enact laws on international jurisdiction and International criminal Laws, which is the need of the day in the era of Global Terrorism.

1.7.3 Contribution to knowledge

This study will help immensely to legal scholars, academicians and students to further their knowledge of the relatively new and rapidly growing subject of International Criminal Law. This will also serve as a reference book to the students of International Law especially in India, where there is negligible contribution to this subject by Indian Legal Scholars.

1.8 Scheme of Research

Research Problem, need of its study, and introduction of the problem.

1.8.1 Introduction to International Crimes

1.8.2 The Definition, elements and meaning of International Crimes i.e. genocide, crimes against humanity and War Crimes according to various International Instruments

1.8.3 The general principles of criminal responsibility under International Criminal Law

1.8.4 The concept of sovereign immunity under the International codified Law and International Customary Law

1.8.5 The concept of Universal Jurisdiction under International Criminal Law

1.8.5.1 The Princeton Principles of Universal Jurisdiction

1.8.6 The conflict between the principles of Universal Jurisdiction and Sovereign Immunity?

1.8.6.1 The issues of Jurisdiction in cases of exercise of Universal Jurisdiction.

1.8.7 The position of International Tribunals and National Courts regarding the defence of sovereign immunity made by various heads of States

1.8.8 The position of Sovereign immunity in today's age of Human Rights

1.8.8.1 Case of General Augusto Pinochet

1.8.9 Possible solution to this problem in existing International Law

1.8.10 Conclusion: Changes is needed in contemporary International Law to eliminate this conflict of Law

CHAPTER 2

INTERNATIONAL CRIMES: HUMAN RIGHTS PERSPECTIVES

2.1. Preliminary remarks

In every legal order general principles are needed, which set out the overall orientation of the system, provide sweeping guidelines for the proper interpretation of the law whenever specific rules on legal construction prove insufficient or unhelpful, and also enable courts to fill the gaps of written or unwritten norms. ICL, being a branch of public international law, shares of course with any other sector of this corpus of rules the general principles proper to it. However, given the unique features and the overarching purpose of this body of law on many occasions those general principles may turn out to be of scant assistance. More useful and relevant appear to be the general principles proper to ICL, for they are more attuned to its specificities.¹

¹ An international court recently questioned reliance on such principles. In *Delalic and others* an ICTY TC, after noting that these principles 'exist and are recognised in all the world's major criminal justice systems' stated that 'it is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems' (§403). The Chamber then explained the difference between the two levels (national and international) as follows 'Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties and conventions, or after a customary practice of the unilateral enforcement of a prohibition by State' (§404).

With respect, this explanation is not compelling. It would rather seem that the difference between national criminal laws and international criminal rules lies in the still rudimentary character of the latter. This body of law has not yet attained the degree of sophistication proper to national legal systems. It follows that the principles in question are not yet applicable at the international level in all their implications and ramifications. Whether or not this legal justification is more cogent than the one advanced by the TC, one can, however, share at least the substance of the conclusions reached by the Chamber, which were as follows. 'It could be postulated, therefore, that the principles of legality in ICL, are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order. To this end, the affected State or States must take into account the following factors, inter alia: the nature of international law; the absence of international legislative policies and standards; the ad hoc processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States' (§405).

In ICL there exist principles that are not specific to this body of law, for the same principles can also be found in most state legal systems of the world. Nonetheless, as we shall see, often the unique features of the international legal order and the way law takes shape therein, condition the content and scope of some of those principles. One may therefore conclude that some of those principles ultimately bear scant resemblance to those of municipal systems, for they are uniquely shaped to suit the characteristic features of the world legal order.

The principle of individual criminal responsibility

In ICL, the general principle applies that no one may be held accountable for an act he has not performed or in the commission of which he has not in some way participated, or for an omission that cannot be attributed to him.

The ICTY Appeals Chamber set this fundamental principle out most clearly in *Tadic* (AJ).² The principle in fact lays down two notions. First, nobody may be held accountable for criminal offences perpetrated by other persons. The rationale behind this proposition is that in modern criminal law the notion of collective responsibility is no longer acceptable. In other words, a national, ethnic, racial, or religious group to which a person may belong is not accountable for acts performed by a member of the group in his individual capacity. By the same token, a member of any such group is not criminally liable for acts contrary to law performed by leaders or other members of the group and to which he is extraneous. The principle of individual autonomy whereby the individual is

² Before ascertaining whether the Appellant could be found guilty under the notion of participation in a common criminal purpose, it stated that 'nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated'. 'The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*). In national legal systems this principle is laid down in Constitutions, in laws, or in judicial decisions. In international criminal law the principle is laid down, inter alia, in Article 7(1) of the Statute of the International Tribunal which states that: A person who planned, instigated, ordered, committed... [a crime]... shall be individually responsible for the crime' (emphasis added) (§186).

An ICTY TC recently restated in *Kordic* and *Cerkez* that this is a general principle applicable at the international level (§364).

normally endowed with free will and the independent capacity to choose his conduct is firmly rooted in modern criminal law, including ICL.

Secondly, a person may only be held criminally liable if he is somehow culpable for any breach of criminal rules. In other words, he may only be deemed accountable if he is somehow involved in the commission of a crime and in addition entertains a frame of mind that expresses or implies his mental participation in the offence, or his culpably negligent (or deliberate) omission to prevent or punish the commission of crimes by his subordinates. As a consequence, objective criminal liability is ruled out.

It follows from the first notion that, among other things, no one may be held answerable for acts or omissions of organizations to which he belongs, unless he bears personal responsibility for a particular act, conduct, or omission.

An exception was, however, provided for in Articles 9 and 10 of the Statute of the IMT at Nuremberg. Article 9(1) stipulated that

At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which that individual was a member was a criminal organization.

Under Article 10

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Thus, mere membership in a criminal organization was regarded as criminal, whether or not participation in that organization was voluntary. The idea behind the whole scheme for post-war trials for war crimes, first propounded by Colonel

Murray C. Bernays in the US Pentagon in 1944, and eventually upheld by the Secretary of War, Henry L. Stimson, was that 'It will never be possible to catch and convict every Axis was criminal, or even any great number of them, under the old concepts and procedures.'³ Given also that Anglo-American law to some extent upholds the notion of corporate criminal liability, it was suggested that it was for an international court to adjudicate and punish the crimes of the leaders and of the criminal organizations. Thereafter, every member of the Nazi Government or of those organizations would be subject to arrest, trial, and punishment in the national courts of each state concerned. 'Proof of membership, without more, would establish guilt of participation in the mentioned conspiracy, and the individual would be punished in the discretion of the court.'⁴ This scheme was confirmed by Control Council Law no.10, of 20 December 1945, which provided in Article II (1)(d) that acts 'recognized as a crime' included 'membership in categories of a criminal group or organization declared criminal by the International Military Tribunal'.

In its judgment in Goring and others the IMT eventually labeled some organizations as criminal: the Leadership Corps of the Nazi Party; the Gestapo and the SD; and the SS. However, the Tribunal discarded the doctrine of 'objective' or 'group responsibility' and brought back the provisions of the Statute to traditional concepts of concepts of criminal law. It made the following qualifying points.

First, it held that the labeling of a group or organization as criminal should not be based on 'arbitrary action' but on 'well-settled legal principles', chiefly the principle that 'criminal guilt is personal' and 'that mass punishments should be avoided'. In addition, 'the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.'

³ See Memo by Colonel Bernays of 15 September 1944, in B.F. Smith, *The American Road to Nuremberg - The Documentary Record-1944-45* (Stanford, Cal.:Hoover Institution Press, 1982), at 35.

⁴ *Ibid.*, at 36.

A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter.

It followed that one 'should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the state for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization'.

Thirdly, the Tribunal issued three 'recommendations' to other courts with regard to penalties to be inflicted on members of criminal organizations.⁵

Fourthly, the Tribunal, each time it termed an organization criminal, added a similar caveat: one could hold criminally liable only those members of the organization who had had 'knowledge that it was being used for the commission' of international crimes, or were 'personally implicated' in the commission of such crimes,⁶ and in addition had not ceased to belong to the organization prior to 1 September 1939 (the start of the war of aggression by Germany).

It would appear that subsequent courts complied. Consequently, members of German organizations termed criminal by the IMT were not punished for the

⁵ They were as follows : '1. That so far as possible throughout the four zones of occupation if Germany the classifications, sanctions and penalties be standardized. Uniformity of treatment so far as practical should be a basic principle [...] 2. [Control Council] Law no. 10 [...] leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty. The De-Nazification Law of 5 March 1946, however, passed for Bavaria, Greater-Hesse, and Wurttemberg-Baden, provides definite sentences for punishment in each type of offense. The Tribunal recommends that in no case should imprisonment imposed under Law no. 10 upon any members of an organization or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law. No person should be punished under both laws. 3. The Tribunal recommends to the Control Council that Law no. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organization so that such punishment shall not exceed the punishment prescribed by the De-Nazification Law' (at 267-8).

⁶ Emphasis added. See *ibid.*, at 262, 268, 273.

mere fact of belonging to one of them. Furthermore, other Tribunals upheld the principle of personal responsibility laid down by the IMT in its judgement.⁷

The principle of legality of crimes

To grasp fully the significance of this principle a few words of introduction are necessary.

National legal systems tend to embrace, and ground their criminal law on either the doctrine of substantive justice or that of strict legality. Under the former doctrine the legal order must primarily aim at prohibiting and punishing any conduct that is socially harmful or causes danger to society, whether or not that conduct has already been legally criminalized at the moment it is taken. The paramount interest is defending society against any deviant behaviour likely to cause damage or jeopardize the social and legal system. Hence this doctrine favours society over the individual (*favor societatis*). Extreme and reprehensible applications of this doctrine can be found in the Soviet legal system (1918-58) or

⁷ Thus, in *Krupp and others*, where the 12 accused were officials of the Krupp industrial enterprises who occupied high positions in the political, financial, industrial, and economic life of Germany, a US Tribunal sitting at Nuremberg held that the defendants could be held criminally liable only if it could be proved that they had 'actually and personally, committed the offences charged. The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient [for criminal liability to arise].' It then cited a rule of the American *Corpus Juris Secundum* on corporate liability, whereby officers of a corporation, normally not criminally responsible for corporate acts performed by other officers or agents, are nevertheless liable if they actually and personally do the acts constituting the offence, or such acts are done by their direction or permission, so that an officer is liable 'where his scienter or authority is established, or where he is the actual present and efficient actor'. The Tribunal added that the same principles must apply in the case of war crimes (at 627-8).

Another US Tribunal sitting at Nuremberg took a similar stand in *Flick and others* (at 1189), and then in *Krauch and others* (*I.G. Farben* trial, at 1108). In this latter case the 23 accused were all officials of *I.G. Farben* industrial enterprises, charged among other things with war crimes. The Tribunal took pains to emphasize that they did not bear collective responsibility but could only be found guilty of individual criminal liability. It noted the following. 'It is appropriate here to mention that the corporate defendant, *Farben* is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term *Farben* as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the Prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that in individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it. Responsibility does not automatically attach to an act proved to be criminal merely by virtue of defendant's membership in the *Verstand* (administration board). Conversely, one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders, or abets. But the evidence must establish action of the character we have indicated, with knowledge of the essential elements of the crime/ (at 1153).

in the Nazi criminal law (1933-45). However, one can also find some variations of this doctrine in modern democratic Germany, where the principles of 'objective justice' (*materielle Gerechtigkeit*) have been upheld as a reaction to oppressive governments trampling upon fundamental human rights, and courts have had recourse to the celebrated 'Radbruch's formula'. Radbruch, the distinguished German professor of jurisprudence, created this 'formula' in 1946. In terms subsequently taken up in some German cases,⁸ he propounded the notion that positive law must be regarded as contrary to justice and not applied where the inconsistency between statute law and justice is so intolerable that the former must give way to the latter. This 'formula' has been widely accepted in the legal literature.⁹

In contrast, the doctrine of strict legality postulates that a person may only be held criminally liable and punished if at the moment when he performed a certain act the act was regarded as a criminal offence by the relevant legal order or, in other words, under the applicable law. Historically, this doctrine stems from the opposition of the baronial and knightly class to the arbitrary power of monarchs, and found expression in Article 39 of Magna Charta libertatum of 1215 (so-called 'Magna Carta'). One must, however, wait for the principal thinkers of the Enlightenment to find its proper philosophical and political underpinning. Montesquieu and then the great American proclamations of 1774 and of the French revolution (1789) conceived of the doctrine as a way of restraining the power of the rulers and safeguarding the prerogatives of the legislature and the

⁸ The German Federal Constitutional Court referred to that 'formula' in its judgment of 24 October 1996 in *Streletz and Kessler*. The question at issue was whether the accused, former senior officials of the former German Democratic Republic (GDR) charged with incitement to commit international homicide for their responsibility in ordering the shooting and killing by border guards of persons trying to flee from the GDR, could invoke as a ground of justification the fact that their action were legal under the law applicable in the GDR at the material time, which did not make them liable to criminal prosecution. The defendants submitted that holding them criminally liable would run contrary to the ban on the retroactive application of criminal law and Article 103(2) of the German Constitution laying down the *nullum crimen* principle. The Court dismissed the defendants' submission. Among other things, it noted that the prohibition on retroactive law derived its justification from the special trust responded in criminal statutes enacted by a democratic legislature respecting fundamental rights.

⁹ Of course, the notion propounded by Radbruch could simply be termed the Natural Justice view that an unjust law is no law and must be disregarded. As such, it might be susceptible to the criticism of positives that it makes the law subjective, since the sense of justice varies from person to person.

judiciary. As the distinguished German criminal lawyer Franz von Liszt wrote in 1893, the *nullum crimen sine lege* and *nulla poena sine lege* principles are the bulwark of the citizen against the state's omnipotence, they protect the individual against the ruthless power of the majority, against the Leviathan. However paradoxical it may sound, the Criminal Code is the criminal's *magna carta*. It guarantees his right to be punished only in accordance with the requirements set out by the law and only within the limits laid down in the law.¹⁰

At present, most democratic civil law countries tend to uphold the doctrine of strict legality as an overarching principle. In these countries the doctrine is normally held to articulate four basic notions : (i) criminal offences may only be provided for in written law, namely legislation enacted by Parliament, and not in customary rules (less certain and definite than statutes) or in secondary legislation (which emanates from the government and not from the parliamentary body expressing popular will); this principle is referred to by the maxim *nullum crimen sine lege scripta* (criminal offences must be provided for in written legislation); (ii) criminal legislation must abide by the principle of specificity, whereby rules criminalizing human conduct must be as specific and clear as possible, so as to guide the behaviour of citizens; this is expressed by the Latin tag *nullum crimen sine lege stricta* (criminal offences must be provided for through specific legislation); (iii) criminal rules may not be retroactive; that is, a person may only be punished for behaviour that was considered criminal at the time the conduct was undertaken; therefore he may not be punished on the strength of a law passed subsequently; the maxim referred to in this case is *nullum crimen sine proevia lege* (criminal offences must be provided for in a prior law);¹¹ (iv) resort to analogy in applying criminal rules is prohibited.

¹⁰ P. von Liszt, 'Die deterministischen Genger der Zweckstrafic'. 13 *Zeitschrift fur die pesamic Strafrechtswissenschaft* (1893), 325-70, at 357 (an English translation of some excerpts from this paper has been published in 5 *JICJ* (2007) 1009-13). The Latin tag *nullum crimen* had been coined by another German criminal lawyer. P.I.A. *Lehrbuch des gemeinen in Deutschland gultigen peinlichen Rechts*, 11th edn (Geissen: Heyer, 1832) at 12-19 (English trans. In 5 *JICJ* (2007), at 1005-8).

¹¹ The German Fedral Constitutional Court set out the principle in admirable terms in its aforementioned decision of 24 October 1996 in Streletz and Kessler. In illustrating the scope of Article 103(2) of the German Constitution, laying down the principle at issue, it stated the following : '(I.a.) Article 103 & 2 of the Basic Law protects against retroactive modification of the assessment of the wrongfulness of an act to the offender's detriment [...] Accordingly, it also requires that a statutory ground of justification which

Plainly, as stated above, the purpose of these principles is to safeguard citizens as far as possible against both the arbitrary power of government and possibly excessive judicial discretion. In short, the basic underpinning for this doctrine lies in the postulate of *favor rei* (in favour of the accused) (as opposed to *favor societatis*, or in favour of society).

In contrast, in common law countries, where judge-made law prevails or is at least firmly embedded in the legal system, there is a tendency to adopt a qualified approach to these principles. For one thing, common law offences (as opposed to statutory offences) result from judge-made law and therefore may lack those requirements of rigidity, foreseeability, and certainty proper to written legislation. For another, common law offences are not strictly subject to the principle of non-retroactivity, as is shown by recent English cases contemplating new offences, or at any rate the extinguishing of traditional defences (see, for instance, *R.v.R.* (1192), which held that the fact of marriage was no longer a common law defence to a husband's rape of his wife).¹² It is notable that the European Court of Human Rights did not regard such cases as questionable, or at any rate contrary to the fundamental provisions of the European Convention (see *SW and CR v United Kingdom*, 1995).

Thus, the condition is not the same in every legal system. Let us now see which of the two aforementioned doctrines is applied in international law.

One could state that international law, being based on customary processes, is more akin to English law than to French, German, Argentinean, or Chinese law. However, this would not be sufficient. The main problem is that for a long period,

could be relied on at the time when an act was committed should continue to be applied even where, by the time criminal proceedings begin, it has been abolished. However, where justifications are concerned, in contrast to the definition of offences and penalties, the strict reservation of Parliament's law-making prerogative does not apply. In the sphere of the criminal law grounds of justification may also be derived from customary law or case-law'.

¹² It would seem that the English law used to be that a man could not rape his wife because, by agreeing to marry, she had implicitly consented to sexual intercourse for all time. This was obviously a somewhat mediaeval approach. The defence existed only as a matter of common law-it was not in any statute. The judge in *R. v. R.* rightly held that societal attitudes had changed and that it was no longer acceptable to hold that a husband could in law never be held guilty of raping his wife; hence he did not allow the old common law defence. In fairness, it was not the introduction of a new offence-rape had always been an offence. It was a question of disallowing a (retrograde) common law defence.

and until recently, international law has applied the doctrine of substantive justice, and it is only in recent years that it is gradually replacing it with the doctrine of strict legality, albeit with some important qualifications.

That international law has long applied the former doctrine is not to be attributed to a totalitarian or authoritarian streak in the international community. Rather, the rationale for that attitude was that states were not prepared to enter into treaties laying down criminal rules, nor had customary rules evolved covering this area. In practice, there only existed customary rules prohibiting and punishing war crimes, although in a rather rudimentary or unsophisticated manner. Hence the need for the international community to rely upon the doctrine of substantive justice when new and extremely serious forms of criminality (crimes against peace, crimes against humanity) suddenly appeared on the international scene.

The IMT clearly enunciated this doctrine in Goring and others. From the outset the Tribunal had to face the powerful objections of German defence counsel that the Tribunal was not allowed to apply *ex post facto* law. These objections were grounded in the general principles of criminal law embedded in civil law countries, and also upheld in German law before and after the Nazi period. The French Judge H. Donnedieu de Vebres, coming from a country where the *nullum crimen* principle is deeply implanted, also showed himself to be extremely sensitive to the principle. As a consequence, when dealing with the crimes against peace of which the defendants stood accused, the Tribunal, before stating that in fact such crimes were already prohibited when they were perpetrated - a finding that still seems highly questionable - noted that in any case it was not contrary to justice to punish those crimes even if the relevant conduct was not criminalized at the time of their commission.

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it

being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.

In other words, substantive justice punishes acts that harm society deeply and are regarded as abhorrent by all members of society, even if these acts were not prohibited as criminal when they were performed.¹³

As stated above, after the Second World War the doctrine of substantive justice (upheld in a number of cases, among which one may cite *Peleus* and later on *Eichmann*)¹⁴ was gradually replaced by that of strict legality. Two factors brought

¹³ In his Dissenting Opinion in the Tokyo trial (Araki and others), Judge B.V.A. Roling spelled out the same principle, again with regard to crimes against peace. He noted that in national legal systems the *nullum crimen* principle 'is not a principle of justice but a rule of policy'; this rule was 'valid only if expressly adopted, so as to protect citizens against arbitrariness of courts [...] as well as arbitrariness of legislators [...] the prohibition of *ex post facto* law is an expression of political wisdom, not necessarily applicable in present international relations. This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom' (at 1059). Judge Roling then delineated two classes of criminal offence: Crime in international law is applied to concepts with different meanings. Apart from those indicated above [war crimes], it can also indicate acts comparable to political crimes in domestic law, where the decisive element is the danger rather than the guilt, where the criminal is considered an enemy rather than a villain and where the punishment emphasizes the political measure rather than the judicial retribution' (at 1060). Judge Roling applied those concepts to crimes against peace and concluded that such crimes were to be punished because of the dangerous character of the individuals who committed them, hence on accurate considerations. In his view, however, given the novel nature of these crimes, it followed that persons found guilty of them could not be punished by a death sentence (*ibid*).

¹⁴ In *Peleus*, in his summing up the Judge Advocate stated: 'You have heard a suggestion made that this Court has no right to adjudicate upon this case because it is said you cannot create an offence by a law which operates retrospectively so as to expose someone to punishment for acts which at the time he did them were not punishable as crimes. That is the substance of the Latin maxim (*nullum crimen sine lege, nulla poena sine lege*) that has been used so much in this Court. My advice to you is that the maxim and the principle [of legality] that it expresses has nothing whatever to do with this case. It has reference only to municipal or domestic law of a particular State, and you need not be embarrassed by it in your consideration of the problems that you have to deal with here' (at 132). It should be noted that the defendants had been accused of killing survivors of a sunken merchant vessel, the Greek steamship *Peleus*; they had raised the pleas of 'operational necessity' and superior orders.

The British Judge Advocate in *Burgholz* (No. 2) took a clearer stand. After noting that the Allies had set up tribunals in Germany and Japan with the object of bringing to justice certain persons who have outraged the basic principles of decency and humanity, he pointed out: 'It may well be that no particular concrete law can be pointed to as having been broken, and you remember what Defence Counsel Dr. Mayer-Labastille said yesterday on the principle of "no punishment without pre-existing law". That principle I agree with but to this extent, that I do not regard it as limiting punishment of persons who have outraged human decency in their conduct' (at 79).

As for *Eichmann*, see the judgment of the Supreme Court of Israel, at 281.

about this change.

First, states agreed upon and ratified a number of important human rights treaties which laid down the *nullum crimen* principle, to be strictly complied with by national courts.¹⁵ The same principle was also set out in such important treaties as the Third and Fourth Geneva Conventions of 1949, respectively, on Prisoners of War and on Civilians.¹⁶ The Expansive force and striking influence of these treaties could not but impact on international criminal proceedings, leading to the acceptance of the notion that also in such proceedings the *nullum crimen* principle must be respected as a fundamental part of a set of basic human rights of individuals. In other words, the principle came to be seen from the viewpoint of the human rights of the accused, and no longer as essentially encapsulating policy guidelines dictating the penal strategy of states at the international level.

The second factor is that gradually the network of ICL greatly expanded both through a number of international treaties criminalizing conduct of individuals (think of the 1948 Convention on Genocide, the 1949 Geneva Conventions, the 1984 Convention on Torture, and the various treaties on terrorism) and by dint of the accumulation of case law. In particular, case law contributed to either the crystallization of customary international rules of criminal law (for instance, on the mental element of crimes against humanity) or to clarifying or specifying elements of crimes, defence, and other important segments of ICL. As a consequence, the principle of strict legality has been laid down first, albeit implicitly, in the two *ad hoc* Tribunals (ICTY and ICTR),¹⁷ and then, explicitly, in the Statute of the ICC, Article 22(1) of which provides that 'A person shall not be

¹⁵ See, for instance, Article 15 of the UN Covenant on Civil and Political Rights, Article 7 of the European Convention on Human Rights, or Article 9 of the American Convention on Human Rights.

¹⁶ See Article 99(1) of the Third Convention and Article 67 of the Fourth Convention. See also Article 75(4)(c) of the First Additional Protocol of 1977

¹⁷ See for instance Articles 1-8 of the ICTY Statute, as well as §29 of the UN Secretary-General's Report to the Security Council for the establishment of the Tribunal (S/25704) ('It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law').

criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.'

The conclusion is therefore warranted that nowadays this principle must be complied with also at the international level, albeit subject to a number of significant qualifications, which we shall presently consider.¹⁸ Articulations of the principle of legality

The principle of specificity

Under the principle of specificity, criminal rules must be as detailed as possible, so as to clearly indicate to their addressees the conduct prohibited, namely, both the objective elements of the crime and the requisite *mens rea*. The principle is aimed at ensuring that all those who may fall under the prohibitions of the law know in advance which specific behaviour is allowed or proscribed. They may thus foresee the consequences of their action and freely choose either to comply with, or instead breach, legal standards of behaviour. Clearly, the more accurate and specific the criminal rule, the greater is the protection accorded to the agent from arbitrary action of either enforcement officials or courts of law.

The principle is still far from being fully applicable in international law, which still includes many rules that are loose in their scope and purport. In this regard, suffice it to mention, as an extreme or most conspicuous instance, the provision first enshrined in the London Charter of 1945 and then restated in many international instruments (Control Council Law no. 10, the Statutes of the Tokyo Tribunal, the ICTY, the ICTR and SCSL), whereby crimes against humanity encompass 'other inhumane acts'.¹⁹ Similarly, the provisions of the four 1949 Geneva Conventions on grave breaches among other things enumerate, as 'grave breaches', 'torture or inhuman treatment'. In addition, many rules contain

¹⁸ On this principle see, among other decisions by the ICTY, AC, Tadić interlocutory Appeal 1995, §92; Delalić and other (TJ, 1998), §§402-7; Jelisić, TJ, §61; Hadzihasanović, Alagić and Kubura, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, AJ, §§32-6

¹⁹ The ICC Statute fleshes the notion out, by providing that crimes against humanity may include 'other inhumane acts of a similar character [to the other, specifically enumerated, classes of such crimes] intentionally causing great suffering, or serious injury to body or to mental or physical health' (Art.7(1)(k)).

notions that are not defined at the 'legislative' level, such as 'rape', 'torture', 'persecution', 'enslavement', etc. Furthermore, most international rules proscribing conduct as criminal do not specify the subjective element of the crime. Nor are customary rules on defences crystal clear they do not indicate the relevant excuses or justifications in unquestionable terms.

Given this indeterminacy and the consequent legal uncertainty for the possible addressees of international criminal rules, the contribution of courts to giving precision to law, not infrequent even in civil law systems, and quite normal in common law countries, becomes of crucial importance at the international level, as has already been pointed out above. Both national and international courts play in immensely important role in gradually clarifying notions, or spelling out the objective and subjective ingredients of crimes, or better outlining such general legal concepts as excuses, justifications, etc.

Thus, for instance, the District Court of Tel Aviv, in *Ternek* spelled out, by way of construction, the notion of 'other inhumane acts' in a manner that seems acceptable.²⁰ Similarly, in defining the concept of 'rape' a TC of the ICTY in *Furundzija* had recourse to general principles of ICL as well as general principles common to the major legal systems of the world, and general principles of law.²¹

²⁰ The Court stated that: 'The defence counsel argue, secondly, that the words "other inhumane acts" which appear in the definition of "crimes against humanity" should be interpreted subject to the principle of *eiusdem generis*. That is, that an "other inhumane act" should be of the type of the specific action mentioned before it, in the same definition, which are "murder, extermination, enslavement, starvation and deportation" [...] We believe that there is truth in the defence counsel's second claim. The punishment determined in Article 1 of the [Israeli] Law [of 1950 on the Doing of Justice to Nazis and their Collaborators] for "crimes against humanity" is death (subject to extenuating circumstances pursuant to Article 11(b) of the Law), and it can be assumed that the legislator intended to inflict the most extreme punishment known to the penal code only for those inhumane actions which resemble in their type and severity "murder, extermination, enslavement, starvation and deportation of a civilian population". If we measure by this yardstick the actions proven against the defendant [beating with bare hand other detainees and making detainees kneel, in the Concentration camp of Auschwitz-Birkenau, where the defendant herself was an inmate, with the role of custodian of Block 7] we shall find that even if some of these actions could be considered inhumane from known aspects, they do not, under the circumstances, reach the severity of the actions which the legislator intended to include in the definition of "crimes against humanity" in Article 1 of the Law' (§7).

²¹ It is worth citing the relevant passage, for that TC proved alert to the principle of specificity. It stated the following : "This TC notes that no elements [for defining rape] other than those emphasized may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The TC therefore considers that, to arrive at an

One should not underestimate, however, another drawback of ICL: the lack of a central criminal court endowed with the authority to clarify for the whole international community the numerous hazy or unclear criminal rules. To put it differently; the contribution of courts to the gradual specification and precision of legal rules, emphasized above, suffers from the major shortcoming that such judicial refinement is 'decentralized' and fragmentary. In addition, when such process is affected by national courts, it suffers from the another flaw: each court tends to apply the general notions of criminal law proper to the legal system within which such court operates. Hence, the possibility frequently arises of a contradictory and 'cacophonic' interpretation or application of international criminal rules.

Fortunately, the draftsmen of the ICC Statute made a significant contribution, when they endeavored to define as precisely as possible the various categories of crimes. (However, as the Statute is not intended to codify international customary law, one ought always to take it with a pinch of salt, for in some cases it may go beyond existing law, whereas in other instances it is narrower in scope than current rules of customary international law. Furthermore, formally speaking that Statute is only binding on the ICC.)

For the time being, international criminal rules still make up a body of law in need of legal precision and some major refinement at the level of definitions and general principles. To take account of these features and at the same time safeguard the right of the accused, currently some notions play a role that is far greater than in most national systems: the defense of mistake of law, the principle of strict interpretation (barring extensive or broad constructions of criminal rules), the principle of favor rei (imposing that in case of doubt a rule should be interpreted in such a manner as to favour the accused). These notions

accurate definition of rape based on the criminal law principle of specificity (Bestimmtheitsgrundsatz, also referred to by the maxim "Nullum crimen sine lege stricta"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws (§177)

act as counter-veiling factors, aimed at compensating for the present flaws and lacunae of ICL.

2.2. THE PRINCIPLE OF NON-RETROACTIVITY

A. General

As stated above, a logical and necessary corollary of the doctrine of strict legality is that criminal rules (that is, rules criminalizing certain classes of human conduct) may not cover acts performed prior to their enactment, unless such rules are more favourable to the accused. Otherwise the executive power, the fiduciary, or even the legislature could arbitrarily punish persons for actions that were allowed when they were carried out. In contrast, the ineluctable corollary of the doctrine of substantive justice is that, for the purpose of defending society against new and unexpected forms of criminality, one may go so far as to prosecute and punish conduct that was legal when taken. These two approaches lead to contrary conclusions. The question is: which approach has been adopted in international law?

It seems indisputable that the London Agreement of 1945 provided for two categories of crime that were new: crimes against peace and crimes against humanity. The IMT did act upon the Charter provisions dealing with both categories. In so doing, it applied *ex post facto* law; in other words, it applied international law retroactively, as the defence counsel at Nuremberg rightly stressed."²²

Many tribunals sitting in judgment over Germans in the aftermath of the Second World War,²³ as well as the German Supreme Court in the British Occupied

²² See the Motion adopted by all defence counsel on 19 November 1945, in *Trial of the Major War Criminals Before the international Military Tribunal, Nuremberg 14 November 1945-1 October 1946* (Nuremberg, 1947), vol. I, at 168-9.

²³ See in particular the *Fritzsche* case (at 971-85), *Kinsatzgruppe M* (at 456-9), *Flicic and others* (at 1189), *Krauch and others* (*J. G. Fur-fan case*) (at 1077-8, 1125), *Krupp* (at 1331), *High Command* (at 487), *Hostages* (1112, 18-42).

Zone,²⁴ endorsed the legal approach taken by the IMT, for all its deficiencies, this stand, while having scant persuasive force with regard to the past, nonetheless contributed to the slow consolidation of the principle of non-retroactivity in ICL.

Subsequently, as a logical consequence of the emergence of the *nullum crime sine lege* principle a general rule prohibiting the retroactive application of criminal law gradually evolved in the international community. 'Thus, the principle of non-retroactivity of criminal rules is now solidly embedded in ICL. It follows that at courts may only apply substantive criminal rules that existed at the time of commission of the alleged crime, this, of course, does not entail that courts are barred from refining and elaborating upon, by way of legal construction, existing rules. The ICTY AC clearly set out this notion in *Aleksovski* (AJ).²⁵

B. Expansive adaptation of some legal ingredients of crimes laid down in international rules to new social conditions

One should duly take account of then at work in ICL, to a large extent made up of customary rules that are often identified, clarified or spelled out, or given legal determinacy by courts. In short, that body of law to a large extent consists of judge-made law (with no doctrine of precedent). Consequently, one should reconcile the principle of non-retroactivity with these inherent characteristics of ICL. In this respect some important rulings of the European Court of Human Rights may prove of great assistance. In particular, in *CR v. United Kingdom*²⁶

²⁴ See the *Bi. case* (at 5), the *B. and A. case* (at 297), the *H. case* (at 232-3), the *N. case* (at 135), and *Angeklagter H.* (at 135)

²⁵ After commenting on the significance and legal purport of the *nullum crimen* principle, that AC added that this principle 'does not prevail in court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements, of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation to the meaning to be ascribed to particular ingredients of a crime' (§127).

²⁶ In 1989 a British national went back to see his estranged wife, who had been living for some time with her parents, and attempted to have sexual intercourse with her against her will; he also assaulted her, squeezing her neck with both hands. He was charged with attempted rape and assault occasioning actual bodily harm, and convicted. Before the European Court he repeated the claim already advanced before British courts, that at the time when the facts occurred, marital rape was not prohibited in the UK. Indeed, at that time a British Statute only prohibited as rape sexual intercourse with a woman who did not consent to it if such intercourse was 'unlawful' (see section 1(1) of the Sexual Offences (Amendment) Act 1976); hence the question turned on determining whether forced marital intercourse was 'unlawful'. Various English courts had ruled, until 1990, that a husband could not be convicted of raping his wife, for the status

the Court held that the European Convention could not be read 'as outlawing the gradual clarification of the rules of criminal liability through Judicial interpretation from case to case, provided that the resulting development is consistent with the essence of the offence and could reasonably be foreseen'.²⁷ In a subsequent case, *Cantoni v. France*, the Court insisted on the notion that in order for criminal law (that is, a statutory provision or a judge-made rule) to be in keeping with the *nullum crimen* principle, it is necessary for the law to meet the requirements of accessibility and foreseeability. It added two important points. First, a criminal rule may be couched in vague terms. When this happens, there may exist 'grey areas at the fringe of the definition':

This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7 [of the European Convention on Human Rights, laying down the *nullum crimen* principle], provided that it proves to be sufficiently clear in the large majority of cases. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice.

The second point related to the notion of foreseeability. The Court noted that the scope of this notion:

depends to a considerable degree on the content of the text in issue, the held it is designed to cover, and the number and status of those to whom it is addressed [...]. A law may still satisfy the requirement of foreseeability even if the person

of marriage involved that the woman had given her consent to her husband having intercourse with her during the subsistence of the marriage and could not unilaterally withdraw such consent. In contrast, Scottish courts had first held that that view did not apply where the parties to a marriage were no longer cohabiting, and then ruled, in 1989, that the wife's implied consent was a legal fiction, the real question being whether as a matter of fact the wife consented to the acts complained of. The word 'unlawful' in the Act referred to above was deleted in 1994 by the Criminal Justice and Public Order Act. This being the legal situation in the UK, before the European Court the applicant argued that the British courts had gone beyond a reasonable interpretation (if the existing law and indeed the intended definition of rape is in such a way as to include facts that until then had not constituted a criminal offence).

Both the European Commission and the European Court held instead (that the British courts had not breached Article 7(1.) of the European Convention on Human Rights ('No one shall be held guilty of any criminal offence on account of any act of omission which did not constitute a criminal offence under national or international law at the time when it was committed').

²⁷ See also *S.W.v. United Kingdom*, §§37-47

concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail [...]. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risk that such activity entails.²⁸

It would seem that the following legal propositions could be inferred from the Court's reasoning. First, while interpretation and clarification of existing rules is always admissible, adaptation is only compatible with legal principles subject to stringent requirements. Secondly, such requirements are that the evaluative adaptation, by courts of law, of criminal prohibitions, namely the extension of such legal ingredients of an offence as acts reus in order to cover conduct previously not clearly considered as criminal must

(i) be in keeping with the rules of criminal liability relating to the subject matter, more specifically with the rules defining 'the essence of the offence';

(ii) conform with, and indeed implement and actualize, fundamental principles of ICL or at least general principles of law; and

(iii) be reasonably foreseeable by the addressees; in other words the extension, although formally speaking it turns out to be to the detriment of the accused, could have been reasonably anticipated by him, as consonant with general principles of criminal law.²⁹

²⁸ In the case at issue the applicant was the owner of a supermarket, convicted of unlawfully selling pharmaceutical products in breach of the Public Health Code. In his application he had contended that the definition of medicinal products contained in the relevant provision of that Code was very imprecise and left a wide discretion to the courts.

²⁹ That notions of foreseeability and accessibility were taken up by the ICTY AC in Hadzihasanovic and others (Decision on Interlocutory Appeal on Jurisdiction in Relation to Command Responsibility), at §34.

To put it differently, courts may not create a new criminal offence, with new legal ingredients (a new *actus reus* or a new *mens rea*). They can only adapt provisions envisaging criminal offences to changing social conditions—as long as this adjustment (resulting in the broadening of *actus reus* or, possibly, in lowering the threshold of the subjective element, for instance, from intent to recklessness, or from recklessness to culpable negligence.) is consonant with, or even required by, general principles.

This process, particularly if it proves to be to the detriment of the accused (which is normally the case.) must presuppose the existence of broad criminal prohibition (for instance, the proscription of rape) and no clear-cut and explicit enumeration, in law, of the acts embraced by this definition. It is in the penumbra left by law around this definition that the adaptation may be carried out. Admittedly, the frontier between such adaptation process and the analogical process, which is instead banned (see below), is rather thin and porous. It falls to courts to proceed with great caution and determine on a case-by-case basis whether the 'adaptation' under discussion is legally warranted and consonant with general principles, and in addition does not unduly prejudice the rights of the accused.

An instance of this process of adaptation of existing law can be seen in the judgment delivered by the ICTY AC in *Tadić* (I), where the AC unanimously held that some customary rules of international law criminalized certain categories of conduct in international armed conflict.³⁰ It is well known that until that decision many commentators, states as well as the ICRC, had held the view that violations of the humanitarian law of internal armed conflict did not amount to war crimes

³⁰ Before pointing to practice and *opinio juris* supporting the view that some customary rules had evolved in the international community criminalizing conduct in internal armed conflict, the AC emphasized the rationale behind this evolution, as follows: 'A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *in urn causa omni ius conflat* (the law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from battle-siege-famine, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence

proper, for such crimes, could only be perpetrated within the context of an international armed conflict. The ICTY AC authoritatively held that the contrary was true and clearly identified a set of international customary rule's prohibiting as criminal certain classes of conduct. Since then this view has been generally accepted.

Similarly, contrary to the submission made by defence counsel in Hadzihasanovic and others,³¹ an 'adaptation' of existing rules (corroborated by a logical construction) warrants the contention this persons may be held accountable under the notion of command responsibility even in internal armed conflicts. Two arguments support this proposition. First, generally speaking the notion is widely accepted in international humanitarian law that each army or military unit engaging in fighting either in an international or in an internal armed conflict must have a commander charged with holding discipline, ensuring compliance with the law, and executing the orders from above (with the consequence that whenever the commander culpably fails to ensure such compliance, he may be called to account). The notion at issue is crucial to the existence and enforcement of the whole body of international humanitarian law, because without a chain of command and a person in control of each military unit, anarchy and chaos would ensue and no one could ensure compliance with law and order. Secondly, and with specific regard to the Statute of the ICTY, Article 7(3) of this Statute is couched in sweeping terms and clearly refers to the commission by subordinates of any crime falling under the jurisdiction of the Tribunal: any time such a crime has been perpetrated involving the responsibility of a superior, this superior may be held accountable to criminal omission (of course, if he is proved to have the requisite mens rea). If this is so, it is sufficient to show that crimes perpetrated in internal armed conflicts fall under the tribunal's jurisdiction, as held in 1995 in Tadic (IA), for inferring that as a consequence the Tribunal has jurisdiction over a commander who failed to prevent or punish such crimes.³²

³¹ See the ICTV TC Decision on joint Challenge to Jurisdiction, 7 Dec 2001, §§15-39.

³² The notions set out in the tent are to a large extent coincident with the rulings in the *Hadzihasanovic and others* made in 2002 by the ICTY TC (Decision on joint Challenge to Jurisdiction), at ¶79, and later, in

2.3. THE BAN ON ANALOGY

National courts (particularly civil law countries as well as international courts normally refrain from applying ICL by analogy; that is, they do not extend the scope and purport of a criminal rule to a matter that is unregulated by law (analogin tegis). In national law the prohibition on the application of criminal rules by analogy (which was not provided for in the German Nazi state or in the Soviet Union, and was banned in China only in 1997, when a new Criminal Code was enacted) is rooted in the need to safeguard citizens and in particular to prevent their being punished for actions that were not considered illegal when they were performed. By the same token, the prohibition is intended to narrow down arbitrary judicial decisions.

The same principle applies in international law. Its rationale is the need to protect individuals from arbitrary behaviour of states or courts (which is another side, or a direct consequence, of the exigency that no one be accused of an act that at the time of its commission was not a criminal offence). In other words, the primary rationale is to safeguard the rights of the accused as much as possible. To satisfy this requirement, analogy is prohibited with regard to both treaty and customary rules. Such rules (for instance, norms proscribing certain specific crimes against humanity) may not be applied by analogy in classes of acts that are unregulated by law.

Article 22(2) of the ICC Statute thus codifies existing customary law where it provides that "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the persons being investigated, prosecuted or convicted." For example,

2003, by the AC (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility), at §§10-36. must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authorities. As we construe it, that section [of the aforementioned Law] provides for the punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic governmentally organized or approved procedures, amounting to atrocities and offences of that kind specified in the act and committed against populations or amounting to persecution on political, racial or religious grounds (at 284-5).

one is not allowed to apply by analogy the rule prohibiting a specific weapon (such as blinding weapons) to a new weapon or, at any rate, to another weapon not prohibited. Nor may one apply by analogy a rule prohibiting a particular use of a specific weapon (for instance, the use of napalm and other incendiary weapons contrary to Protocol III to the 19PO UN Convention on Conventional Weapons) to another use;- of that weapon. Consequently, one is not allowed to criminalize the use of those weapons when their use was permitted.

As the aforementioned provision of the ICC Statute makes clear, a prohibition closely bound up with that of analogy is the ban on broad or extensive interpretation of international criminal rules, and the consequent duty for states, courts, and other relevant officials and individuals to resort to strict interpretation.

This principle entails that one is not allowed to broaden surreptitiously, by way of interpretation, the scope of rules criminalizing conduct, so as to make them applicable to instances not specifically envisaged by those rules.

An example of strict construction can be found in some post-Second World War cases relating to the notion of crimes against humanity. In *Altstötter and others* a US Military Tribunal sitting at Nuremberg held that that notion, as laid down in Control Council Law no. 10.

The finding was cited with approval in *Fauk and others*, handed down by another US Military Tribunal sitting at Nuremberg (at 1216), where the Tribunal also held that under a strict interpretation of the same notion, crimes against humanity do not encompass offences against property, but only those against persons.³³

Three qualifications must, however, be set out restricting the ban on analogy.

³³ Subsequently the Dutch Serial Court of Cassation took up in *Aibrecht* (at 397-S) and in *Bellmer* (M 543), as well as in *Haase* (at 432), the same strict interpretation advanced in *Altstötter and others*.

First, international law only prohibits the so-called analogical extension (that is, the extension of a rule so as to cover a matter that is formally unregulated by law). It does not bar the regulation of a matter not covered by a specific provision or rule, by resorting to general principles of ICL, or to general principles of criminal justice, or to principles common to the major legal systems of the world [so-called *analogia juris*].³⁴ National and international courts or tribunals have repeatedly affirmed that it is permissible to rely upon such principles for establishing whether an international rule covers a specific matter in dispute. To be sure, the question has always been framed as one, of interpretation, rather than analogical application. Nevertheless, whatever the terminology employed, the fact remains that gaps or *lacunae* have been filled by resort to those principles. It should, however, be that drawing upon general principle should never be used to criminalize conduct that was previously not prohibited by a criminal rule. It may only serve to spell out and clarify, or give a clear legal contour to, prohibitions that have already been laid down in either customary law or treaties. In other words, this approach may only be resorted to for the interpretation of existing rules, not to the creation of new classes of criminal conduct. To hold the contrary would mean to admit serious departures from the *nullum crimen* principle, contrary to the whole thrust of current ICL.

Secondly, in quite a few cases international rules themselves invite or request analogy, through the *eiusdem generis* canon of statutory construction [whereby when in a legal rule general words follow the enumeration of a particular class of persons or things, the general words must be construed as applying to persons or things of the same kind or class as those enumerated]. For instance, the customary and treaty rules prohibiting and penalizing as crimes against humanity 'other inhumane acts', as well as the provisions of the 1949 Geneva Conventions criminalizing as 'grave breaches' of the Convention 'inhuman acts' in addition to torture, impose upon the interpreter the need to look at acts and conduct analogous in gravity to those prohibited. This indeed was the reasoning of the Tel

³⁴ Resort to general principles of law recognized by civilized nations is termed by Anzilotti (op. cit., 106-7) *analogia juris*. It should be noted, however, that according to the celebrated international lawyer those general principles did not constitute an autonomous source of international law

Aviv District Court in Ternek.³⁵ The draftsmen of the ICC Statute took the same logical approach when they criminalized in Article 7(l)(k) 'other in humane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' (emphasis added),

Thirdly, in some cases international law allows a logical approach that at first glance runs foul of the ban on analogy, but which is in fact permissible because it applies to general principles. An example will clarify this proposition. In the case of a new weapon that does not fall under any specific prohibition precisely because of its novel features, analogical extension of an existing treaty ban is not allowed, as pointed out above. Nevertheless, one is authorized to enquire whether the new weapon is at variance with the general principle proscribing weapons that are inherently indiscriminate or cause unnecessary suffering. For this purpose, one may justifiably look at those weapons that have been prohibited by treaty because they are either indiscriminate or cause superfluous sufferings. The object of this enquiry will not be the application of these treaty prohibitions by analogy, but rather to better ascertain whether the characteristics of the new weapon are such as to make them contrary to the general principle. It would seem that the District Court of Tokyo in Shimoda and others took precisely this approach (although, of course, it had been requested to pronounce on a question of civil liability, not of criminal law).³⁶

2.4. THE PRINCIPLE OF FAVOURING THE ACCUSED

Another principle is closely intertwined with the ban on analogy, and is designed to invigorate it. This is the principle requiring, when faced with conflicting

³⁵ See *supra*, n.21.

³⁶ After noting that the use of an atomic bomb was 'believed to be contrary to the principle of international law prohibiting means of injuring the enemy which cause unnecessary suffering or are inhuman', the District Court of Tokyo noted that the bomb was a new weapon. It then pointed out that the employment of asphyxiating, poisonous, and other gases and bacteriological methods of warfare was prohibited, noting that it could 'safely be concluded that besides poisons, poisonous gases and bacteria, the use of means of injuring the enemy which cause injury at least as great as or greater than the prohibited materials is prohibited by international law'. The Court concluded that 'It is not too much to say that the sufferings brought about by the atomic bomb are greater than those caused by poisons and poisonous gases' indeed the act of dropping this bomb may be regarded as contrary to the fundamental principle of the law of war which prohibits the causing of unnecessary suffering' (at 1694-5).

interpretations of a rule, the construction that favours the accused: see also ICC Statute, Article 22(2). An ICTR TC upheld this principle in *Akayesa* with regard to the interpretation of the word 'killing' in the Genocide Convention and the Statute of the ICTR.³⁷ An ICTY TC reaffirmed the principle in *Krstic*. The question was how to interpret the notion of 'extermination' as a crime against humanity. The Chamber pointed out that the ICC Statute provides that extermination may embrace acts 'calculated to bring about the destruction of part of the population', namely only a limited number of victims; it stressed that under customary law extermination generally involves a large number of victims. It went on to hold as follows:

This definition [that is, that contained in the ICC Statute was adopted after the time the offences in this case were committed. In accordance with the principle that where there is a plausible difference of interpretation or application, the position which most favours the accused should be adopted, the Chamber determines that, For the purpose of this case, the definition should be read as meaning the destruction of a numerically significant part of the population concerned.

It should be noted that the principle of construction in favour of the accused (*favor rei*) has also been conceived of as a standard governing the appraisal of evidence: in this case the principle is known as *in dubio pro reo* (in case of doubt, one should hold for the accused). For instance, in *Flick and others*, a US Military Tribunal sitting at Nuremberg held that it must be guided among other things by the standard whereby 'If from credible evidence two reasonable inferences may

³⁷ With regard to the word *meurtre* (in French) and 'killing' in English, contained in the phrase 'killing members of the group' (as a category of genocide), the TC noted the following: "The TC is of the opinion that the term 'killing' used in the English version is too general, since it could very well include both intentional and unintentional homicides, whereas the term 'meurtre', used in the French version, is more precise. It is accepted that there is murder when death has been caused with the intention to do so, as provided for, incidentally, in the Penal Code of Rwanda, which stipulates in its Article 31.1 that 'Homicide committed with intent to cause death shall be treated as murder'. Given the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the accused should be upheld and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which 'meurtre' (killing) is homicide committed with the intent to cause death' (§§500-1).

be drawn, one of guilt and the other of innocence, the latter must be taken' (at 1189).³⁸ The notion was also upheld in *Stakic*.³⁹

2.5. THE PRINCIPLE OF LEGALITY OF PENALTIES

It is common knowledge that in many states, particularly in those of Romano-Germanic tradition, it is considered necessary to lay down in law a tariff relating to sentences for each crime, so as: (i) to ensure the uniform application of criminal law by all courts of the state; and (ii) to make the addressee cognizant of the possible punishment that maybe meted out if they transgress a particular criminal provision.

This principle is not applicable at the international level, where these tariffs do not exist. Indeed, states have not yet agreed upon a scale of penalties, due to widely differing views about the gravity of the various crimes, the seriousness of guilt for each criminal offence, and the consequent harshness of punishment. It follows that courts enjoy much greater judicial discretion in punishing persons found guilty of international crimes. However, some statutes of international tribunals set forth limitations on the absolute discretion of judges. Thus, for instance, Article 24(1) of the ICTY Statute provides, first, that penalties will be limited to imprisonment (thus ruling out the death sentence), and, secondly, that 'In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.' This last provision was applied in various cases,⁴⁰ although it was generally not held mandatory. Article 23 of the ICTR Statute is identical, but it

³⁸ Another US Military Tribunal sitting at Nuremberg upheld the principle in *Krauch and others* (I. G. Farben case) (at 1108).

³⁹ The TC explicitly distances itself from the Defence submission that the principle in *dubio pro reo* should apply as a principle for the interpretation (if not substantive criminal law) of the Statute. As this principle is applicable to findings of fact and not of law, the TC has not taken it into account in its interpretation of the law' (T), 416).

⁴⁰ See, for instance, in *Erdemovic and Tadic* (Sentencing 1, 1997) (§§-10), *Tadic* (sentencing 1, 1999) (§§10-13), *Delalic and others* (§§1193-212), and *Kupreikic and others* (§§839-47)

refers of course to the general practice regarding opinion sentences in the courts of Rwanda.

As for the Statute of the ICC, Article 23 provides that 'A person convicted by the Court may be punished only in accordance with this Statute' and Article 77 confines it self to envisaging imprisonment for a maximum of 30 years, while at the same time admitting life imprisonment 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'. It thus implicitly rules out the death penalty, but does not establish a scale of sentences, nor does it suggest that the Court should take into account the scale of penal ties of the relevant territorial or national state. The Court is thus left with a very broad margin of appreciation.

2.6. THE OBJECTIVE AND SUBJECTIVE ELEMENTS OF CRIMES

In any legal system, crimes consist of two elements; (i) conduct (an act or omission, contrary to a rule imposing a specific behavior; this is called *actus reus*, that is a culpable act); and (ii) state of mind, a psychological element required by the legal order for the conduct to be blameworthy and consequently punishable also called culpable frame of mind or *mens rea*.

In international law also, there exist rules prescribing that individuals (whether acting as state officials or as private persons) take a certain conduct (for instance, they must refrain from killing civilians or from injuring prisoners of war in an armed conflict, or from engaging in large-scale torture of persons held in detention, or from murdering a multitude of persons belonging to a certain ethnic, national, religious or racial group). As in national legal systems, also in international law, conduct contrary to a substantive rule of this corpus of law is not sufficient for individual criminal responsibility to arise. A mental element is also required, in some way directed to be linked with the commission of the criminal act.

2.7. THE STRUCTURAL ELEMENTS OF INTERNATIONAL CRIMES

We will consider the specific acts, actions, or omissions falling under the notion of *actus reus* when we move on to examine the various classes of international crime. It is necessary now to dwell on some criminal notions relating to the essential structure of such crimes.

Two main features characterize international crimes proper.⁴¹ First, they consist of conduct taken or acts performed by either (i) state officials (for instance, servicemen engaged in war, or political leaders planning or ordering genocide, etc.); or (ii) private individuals,

What is notable is that this conducts either (a) Linked to an international or internal armed conflict or, absent of such a conflict, (b) has a political or ideological dimension or is somehow linked or otherwise connected to (instigated, influenced, tolerated, or acquiesced in) the behavior of state authorities or organized non-state group), or entities.

Thus, it is characteristic of such crimes that, when perpetrated by private individuals, they are somehow connected with a state policy or at any role with system criminality'.⁴¹ On this score international crimes are thus different from criminal offences committed for personal purposes (private gain, satisfaction of personal greed, desire for revenge, etc.) as is the case with ordinary criminal offences such as theft, robbery, assault, kidnapping for extorting a ransom, etc., or such other crimes that have a transnational dimension but pursue private goals, such as piracy, slave trade, trade in women and children, counterfeiting currency, drug dealing, etc.

⁴¹ see on this matter P. Gaeta, 'International Criminalization of Prohibited Conduct', in A. Cassese(ed.), *Oxford Companion to International Criminal Justice* [forthcoming].

The fundamental hallmark of international crimes, which I have just highlighted, is also called 'the international element' or 'a context of organized violence' of such crimes.⁴²

The second notable feature of international crimes, inextricably intertwined with the one I have just conceptualized, is that they normally possess a twofold dimension or are double-layered. They constitute criminal offences in domestic legal systems: serious bodily harm, murder, rape, sexual assault, torture, persecution, etc., in that they infringe municipal rules of criminal law. In addition, they have an international dimension, in that they breach values recognized as universal in the world community and enshrined in international customary rules and treaties. It follows that normally these crimes consist of an 'underlying offence' (for example, murder or torture) with the requisite objective and subjective elements of such offence, plus an objective and mental element required by the international rules that contemplate the crime at issue. For instance, we will see that murder as a crime against humanity requires (i) the objective element of murder (causing the death of another person) as well as a mental element (intent to bring about by one's action the death of another person); plus (ii) a broader objective context (the existence of a widespread or systematic attack on the civilian population, whether in time of armed conflict or in time of peace) and a mental element: awareness of the existence of such broader context.

These features relate to the vast majority of cases. There are, however, also crimes that do not possess this double dimension, in that they do not encompass an underlying criminal offence. For instance, the use of prohibited weapons in time of war or the indiscriminate attack of civilians in an internal armed conflict is per se an international crime, without necessarily having a 'domestic' underpinning. It follows that what is required for the crime to be perpetrated is a conduct defined in international rules (for example, using a weapon that is

⁴² The notion of 'the international element' as opposed to individual criminality was first put forward by the great Dutch scholar and judge B.V.A. Holing, 'The Law of War Under the National Jurisdiction Since 1945' 100 *HagueM Recueil*. 1960-11,335ff; see also the Significance of the Laws of War', in A. Cassese (ed.), *Commentaries on International Law* (MiliM-GwSi-i, 1975), 137-9.

proscribed by international law) as well as a mental element (the intent to use the weapon). The same holds true for a sub-category of crimes against humanity, namely persecution.

Further more, as is normally the case in domestic legal systems with all criminal offences, international crimes also can be split into conduct, consequences, and circumstances, from the point of view of their objective structure.⁴³

The conduct is described by the international rule that imposes a certain behavior (for instance, respect civilians in a civil war, or protect prisoners of war in international armed conflict) and therefore criminalizes any act or omission contrary to such a rule. Consequences are the effects caused by one's conduct. Between conduct and consequences there is, of course, in causation nexus: for instance, I fire a missile at a hospital and thus bring about the destruction of the building and the death of dozens of civilians and wounded persons. From this point of view crimes maybe held to belong to two different Categories: crimes of conduct and crimes of result. The former category comprises offences consisting in the breach of an international rule that imposes a specific behavior, there, it is irrelevant whether or not this breach brings about any harm or injury to respective victims. (Think, for instance, of the rule that obliges belligerent, to refrain from declaring that no quarter will be given; that is, that in combat operations enemies will not be captured but will be killed, even if they surrender; the same holds true for the rule prohibiting the use of a certain mean of warfare, for instance dum dum bullets or chemical or bacteriological weapons; the use of these weapons constitutes a breach of IHL and a war crime, even if in a specific case no damage to the adversary is in fact caused by such use.) Crimes of result embrace violations of rules that confine themselves to imposing the achievement of a certain end, regardless of the modalities for the realization of that end; for instance, causing disproportionate casualties among civilians when attacking a military objective, or starving prisoners of war.

Consequences of a crime are the effects of criminal conduct. Most international criminal rules focus on the harm caused by human behaviour and proscribe

⁴³ G. Werle, *Principles of International Criminal Law* (The Hague; T. M. C. Asser Press, 2005), 94-S.

conduct that is such as to bring about such harm: for instance, they criminalize the killing of civilians, the wounding of prisoners of war, the rape of women. The rationale behind this emphasis is that the primary goal of international criminal law is to prevent and punish behaviour that injures protected persons. On this score 'consequences' are particularly relevant with regard to 'crimes of result', as defined above.

Circumstances are 'any objective or subjective facts, qualities or motives with regard to the subject of the crime (such as the perpetrator and any accomplices), the object of the crime (such as the victim or other impaired interests) or any other modalities of the crime (such as means or time and place of commission)⁴⁴ Thus, for instance, in the rule imposing on military commanders and, more generally, on superior authorities to prevent and repress crimes by their subordinates, one of 'the circumstances of the crime is that a person is a military commander or a civilian superior. Similarly, in the rule banning crimes against humanity the 'forcible transfer of population, the use of force in bringing about the movement of a multitude of civilians from one place to another is a 'circumstance' required by the rule.

2.8. GENERAL FEATURES OF THE SUBJECTIVE ELEMENT

It is not easy to identify the various forms and shades of the mental element in ICL. Two problems arise.

First, substantive rules concerning crimes often do not specify the subjective element required for each specific offence. An exception may be found in the various substantive provisions of the ICC Statute: Articles 6 (on genocide), 7 (on crimes against humanity), and 8 [on war crimes], and the accompanying 'Elements of Crime' elaborated pursuant to Article 9. Most of the time these provisions set out the subjective element required for each class of crime. However, in this respect the provisions of the Statute are hedged about with two

⁴⁴ See A. Eser, 'Mental Element-Mistake of Fact and Mistake of Law' in Cassese, Gaeta, Jones, ICC Commentary, vol. 1, 911-20.

major limitations. They are only designed to set out the categories of crime over which the ICC may exercise jurisdiction; in other words they are not couched as provisions of a criminal code. Furthermore, they are not intended to codify, or restate, or contribute to the development of customary international law. Their legal value is therefore limited (although, of course, they may gradually have a bearing on, and bring about a change in, existing law).

Secondly, there is no customary rule setting out a general definition of the various categories of mens rea (such as intent, recklessness, or negligence). In this respect the only exception is Article 30 of the ICC Statute, on 'mental element'. However, it is doubtful that it reflects customary international law. In addition, as we shall see, even at the level of treaty law, it is not certain that it encompasses all the various possible subjective elements of international crimes.

This difficult condition is compounded by the failure of national case law to cast light on the matter. It is state courts that have handed down the bulk of 'Judicial decision' dealing with this matter, and each court has applied the rules of criminal law proper to its own domestic system. Depending on the legal tradition to which it belonged, and court has placed its own interpretation on the notion of intent, fault, or negligence.

Consequently, to tackle the first of the two problems outlined above, one should first identify all the international substantive provisions which themselves lay down, implicitly, the subjective element required for their violation to amount to an international crime. One ought also to draw upon the case law of international tribunals, to the extent that they have pronounced on the matter. To come to grips with the second problem, one must start from the assumption that has in other fields of ICL, what matters is to identify the possible existence of general rules of international law or, in the absence of such rules, principles common to the legal systems of the world. To pinpoint such rules, one may chiefly rely on: (i) the case law of courts, with special attention being paid to the judicial decisions of international tribunals, in particular the ICTY and the ICTR (these decisions have in fact proved to be of crucial importance in the gradual elaboration of the

various mental elements of each category of international crime); And (ii) the existence of some practices common to all major legal systems of the world, as evidence of a convergence of these systems and confirmation that parallel principles have also taken shape at the international level.

I shall briefly mention some instances of how the first of the two problems is sometimes solved. I shall then concentrate on the second problem; that is, the general definitions of the various categories of subjective element that one may deduce from a perusal of international rules and the relevant case law.

2.9. GENERAL NOTIONS OF MENS REA COMMON TO MOST LEGAL SYSTEMS OF THE WORLD

By way of introduction, it may prove fitting to undertake a brief comparative survey of the attitude taken towards the definition of the major facets of mens rea by the major legal systems of the world. It is apparent that, in spite of broad differences in terminology, most legal systems tend to take the same basic approach to the specific regulation of each aspect of mens rea, and its implications. They tend to require one of the following frames of mind, for conduct to be considered criminally punishable (these are listed in decreasing order of culpability):

2.9.1 Intention, namely awareness that a certain conduct will bring about a certain result in the ordinary course of events, and will to attain that objective: for example, use a gun to shoot at a person because I want to cause his death and anticipate that as consequence of my shooting he will die. This class of mens rea is normally called intent.

2.9.2 Awareness that undertaking a course of conduct carries with it an unreasonable or unjustifiable risk of producing harmful consequences, and the decision nevertheless to go on to take that risk. For instance, I perceive the risk that using a certain weapon may entail killing dozens or even hundreds of innocent civilians, and nevertheless willingly ignore this risk. This class is

normally called recklessness (or *Eventualdolus*, or *bedingter Vorsatz*), *dolus eventualis*).⁴⁵

2.9.3 Failure to pay sufficient attention to or to comply with certain generally accepted standards of conduct thereby causing harm to another person when the actor believes that the harmful consequences of his action will not come about, thanks to the measures he has taken or is about to take. For instance, an attendant at a mental hospital causes the death of a patient by releasing a flow of boiling water into the bath; one of two persons playing with a loaded gun points it at the other and pulls the trigger believing that it will not fire because neither bullet is opposite the barrel; however, as the gun is a revolver, it does fire, killing the other person.⁴⁶

This class is normally referred to as advertent or culpable negligence (*negligence consciente*, *bewusste Fahrlässigkeit*) where the agent's conduct seriously or blatantly fails to meet the standards of the reasonable man test.⁴⁷

⁴⁵ Under Art. 2(2)(c) of the US Model Penal Code, 'A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation' (emphasis added).

On *dolus eventualis* see in particular G. Fletcher, *Rethinking Criminal Law*, 1978 reprint (Oxford: Oxford University Press, 2000), 445-9.

⁴⁶ See A. Ashworth, *Principles of Criminal Law*, 5th edn (Oxford: Oxford University Press, 2006), 191-5. See also A. P. Simester and G. R. Sullivan, *Criminal Law—Theory and Doctrine* (Oxford: Hart, 2002), 139-40. According to D. L. Hart ('Negligence, Mens Rea and Criminal Responsibility', in *Punishment and Responsibility*, Oxford: Oxford University Press, 1968, at 149), 'Negligence is gross if the precautions to be taken against harm are very simple, such as persons who are but poorly endowed with physical and mental capacities can easily take.' A. P. Simester and G. R. Sullivan (at 140) provide a telling example: It may be negligent to drive around a particular bend at 50 mph; if so, it is grossly negligent to do so at 80 mph. It will also be gross negligence if the risk created by the defendant is very obvious.'

⁴⁷ Under Art. 2(2)(d) of the US Model Penal Code, 'A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation' (emphasis added).

2.9.4 Failure to respect generally accepted standards of conduct without, however, being aware of or anticipating the risk that such failure may bring about harmful effects. To prevent road accidents, some countries envisage this state of mind for drivers who act negligently (for instance, cause the death of a pedestrian by not stopping at the stop sign, or by driving at excessive speed or in a state of intoxication).

This class is normally termed inadvertent negligence (negligence inconsciente, unbewusste Fahrlässigkeit).

These are, of course, only general trends of national criminal law. The courts of some states often do not draw such a fine distinction between the aforementioned shades on the scale of criminal culpability.⁴⁸ Similarly, national laws or military manuals may set out notions that do not necessarily fit in the above enumeration of forms of mens rea.⁴⁹

Depending on the category of crime and the degree of responsibility, international customary rules (resulting from opinio juris seu necessitas, i.e. the

⁴⁸ For instance, in 1975 in *Robert Strong* the Court of Appeals of New York held that, from the point of view of the mental state of the defendant at the time the crime was committed, the essential distinction between the crime of 'manslaughter in the second degree' (that is, recklessly causing the death of a person, or intentionally causing or aiding a person to commit suicide, or committing upon a female an abortion causing her death), and 'criminally negligent homicide' (that is, causing the death of a person with criminal negligence) is that in the former class of crime 'the actor perceives the risk but consciously disregards it', whereas in the latter the actor 'negligently fails to perceive the risk'. In the case at issue the accused, a leader of a Muslim sect with a sizeable following, purportedly exercising his powers of 'mind over matter' used to perform ceremonies such as walking through fire, performing surgical operations without anaesthesia, or stopping a follower's heartbeat and breathing while he plunged knives into his chest without any injury to the person. Although he had performed this last-mentioned ceremony countless times without once causing an injury, in the case brought before the court the follower had died as a result of the wounds. The jury found that the defendant was guilty of manslaughter in the second degree, as charged, without considering whether he could have been guilty of the lesser crime of criminally negligent homicide. The Court of Appeals held that in this case the jury could have found that the defendant 'failed to perceive the risk inherent in his actions [...] The defendant's conduct and claimed lack of perception, together with the belief of the victims and the defendant's followers, if accepted by the jury, would justify a verdict of criminally negligent homicide' rather than manslaughter in the second degree (568-9).

⁴⁹ Thus, for example, according to the Australian Detention Force Discipline Manual, 'A person can be said to have acted recklessly when he is aware that certain harmful consequences are likely to flow from a particular act but he performs the act despite the risk. A person acts negligently when he performs an act without consideration of the probable harmful consequences which will flow from it but where those harmful consequences would be foreseeable by a reasonable man' (S-W).

conviction that a certain behaviour is necessary or is dictated by a legal rule, and international practice, as evidenced by case law, treaty provisions if any, the views of state officials, and the convergence of the major legal systems of the world) envisage various modalities of the mental element. As mentioned above, the ICC Statute includes a provision, Article 30, that specifically deals with this matter. However, this provision has a limited purport, for it only applies to the crimes falling under ICC jurisdiction and in addition does not reflect or codify customary rules. It therefore may not apply to other international courts or tribunals, which are bound either by their own Statute or, if such Statutes do not regulate the matter (which is indeed the case), by customary international law,

2.10 GENERAL CATEGORIES OF MENS REA: INTENT

By intent or intention {*dolus directus*} is meant awareness that by engaging in a certain action or by omitting to act I shall bring about a certain result (such as, for example, the death of a civilian) coupled with the will to cause such result. For instance; I want to kill a civilian. So I shoot him and he dies as a result of my act. I must therefore answer for this crime, Or else, I think he is dead but in fact he has not: died; he only dies later of exposure because he is left in the cold. It does not matter that my conduct did not kill him—I am guilty of murder because: (1) I intended him to die (*mens rea*); and (ii) he died as a result of my acts (because he would never have been lying exposed were it not for any acts). As a rule, my intent only has to be linked to a certain result (the death of the victim).

International rules require intent for most international crimes, although, as we shall see, under certain circumstances other states of mind are admissible.

As an illustration of intent, Enigster may be mentioned, The accused, a Jewish internee in a Nazi concentration camp having the rank of Schieiler or group leader, had been charged with crimes against humanity, in particular, grievous injuries, against his fellow inmates. In examining the alleged grievous attack on another inmate, named Schweizer, the District Court of Tel Aviv had to establish whether all the necessary elements were present; it therefore asked itself, among other things, whether the requisite intent also existed. It noted that in this respect

no special testimony had been brought to the Court; it nonetheless had to determine whether the accused had that intent. The Court noted the following: As to 'intent', it is a well settled that person in ill's right mind is held to intend the natural consequences of his actions. As it appears from the severe results of the blows struck by the defendant, the blows were inflicted with sonic significant force, and for this reason, and barring any proof that the defendant landed from his own free will, it must be concluded of his mind, that he intended to cause Schweizer grievous damage.

Premeditation, which is normally not required for international criminal responsibility, occurs when the intent to engage in conduct contrary to an international substantive rule is formed before the conduct is actually embarked upon. As the Turin Military Tribunal pointed out in *Sliveckf* in 1999 (at 14) and repeated in *Engel* in 2000 (at 13), perpetration necessarily requires two elements: one of a temporal nature, namely that some time must pass between the formation of the criminal intent and its being carried out; the other of a psychological nature, namely that the criminal intent must persist from the involvement of its formation until final perpetration of the crime.⁵⁰

In some instances premeditation may coincide with, or overlap, the criminal action. However, while planning, as we shall all see, has an autonomous scope

⁵⁰ The Court went on to say that 'In regard to this it must remembered that the defendant denied the entire action and did not give any explanation that could have shown an other intent or arouse doubts as to his evil intent. In addition, it is clear fom the testimony that no Germans were present while the blows wm being landed, and it was not proven, as mentioned above, that the (lelendans was bound by the orders of the Germans, to do thsdeed he did in general, and in the way he did it, in particulier' (§14). See also Gotzfrid, at 22-3, 62.

On the notion ot" 'del ibri-atc'~attalk on a i:iv ilia ii population) i n crimes again st hum anil)', see some Indo- nriiancasti: Herman iieiiyyn<? andotherf (at fi9), Afep Kuiwani (at 47-?), and YayatS:iiiniijat (at 6). 1? In 1971 a US m ilitary judge took a),iinilnr st.ind in Cnlky, although less accurately spelled out, when he issued instruct ions to the Court-M a rtial.Hepol ii redouthalpremedilatedniudiir (which under US Saw is a distinct Mtegon- from, and not an aggravating circumstance tor, unpremeditated murder) is a murder whhretheaturhad 'a premeditated deni gii to k il]'; thist'xpressiol] means 'formation of a s,peci(ic in tent to kill and considerarion ithe act [...! or the acts intended to bring about death {...] prior to doing them. It is nolnettilary that the "ptemedited design lo kill" shull have been entertained for any particular or considerable length of time, but it must precede the killing.'In contra si, in the case of unpremeditated murder, only Intent to kill 'is required (wherea sinthica se of vol untary man slaughter the person entertains 'an in lent to kill but kJlis in the heat of sudden passion caused by adequate provocation') (at 1703-10). See also ManHel Gonwhes Letc Sere (at 10).

and legal significance, predetermination has not. In ICL premeditation may only be material to sentencing, for it may amount to an aggravating Circumstance.⁵¹

2.11. THE ROLE OF KNOWLEDGE WITHIN (AND WITHOUT) INTENT

' Knowledge ' is not a notion similar to civil law countries) where it is not regarded as an autonomous category of mens rea, being absorbed either by intent or by recklessness, In contrast, the notion as a distinct class of mental attitude in criminal behavior is widespread in some. Common law countries, particularly the United States, where one may find a clear-cut definition in the Model Penal Code. There it is stated at section 2.02 that

A person acts knowingly with respect to a material element of an offence when;

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a *res ulto* this conduct, he is aware that it is practically certain that his conduct will cause such a result.⁵²

In such countries as the UK, some distinguished commentators consider knowledge as having the same value and intensity as intent, with the difference that intent 'relates to the consequences specified in the definition of the crime' (for instance, death as a result of killing, i ii the case of voluntary murder), whereas knowledge 'relates to circumstances forming part of the definition of the

⁵¹ In the two cases quoird above, the Turin Military Tribunal held that premeditasinn had been proved and consequently considered it in aggravating circumstance: see Sancke, at 14-15, a il dE.ngi:i at 13.

⁵² 14 See Moiliil Penal Code and CawmeMaries (Official lhaft and Reriftd Comments), Part I, vol. I (Philadelphia, Pa.; The American Law Institute, 1965.1,225-6.

The Model Penal Code then specilw that 'when knowledge of the exisittiee ofa particular fact is in element of an offender, such knowledge is established if a person ii aware of a high probability of its existence, unless, he actually believes that it does not exist' (at 227).

crime"⁵³ (for instance, the circumstances that property belongs to another person, in the case of criminal damage to property).

In short, it would seem that in some common law countries, knowledge denotes two different forms of mental attitude, depending on the contents of the substantive criminal rule at stake: (i) if the substantive penal rule prescribes the existence of a particular fact or circumstance for the crime to materialize, knowledge means awareness of the existence of the fact or circumstance, (ii) if instead the substantive criminal rule focuses on the result of one's conduct, then knowledge means (a) awareness that one's action is most likely to bring about that harmful result, and nevertheless (b) taking the high risk of causing that result. Plainly, in category (i) knowledge is part of intent (which involves not only the will to accomplish a certain action and thereby attain certain result, but also awareness of the factual circumstances implicated in the action). Instead, in category (ii) knowledge substantially coincides with recklessness, as defined below (see *infra*, 3.7).

International rules, probably under the influence of US negotiators, uphold the notion under discussion, in both versions. Also Article 30(2) of the ICC Statute incorporates both versions, in that it stipulates that knowledge 'means awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.

In addition, some international rules also rely upon or require a third notion of knowledge, i.e. as the mere fact of being apprised of a certain fact. Here, knowledge is disconnected from intent or recklessness; it is not part of, nor is it closely connected to intent or recklessness (as instead in the murder of a civilian, where there is intent to cause the death of a human being and awareness of his status as a civilian; or, as in the bombing of a military objective situated in a densely populated area, where there is intent to bring about the destruction of the military objective and the deliberate taking of the risk of killing civilians in the

⁵³ See Ashworth, *Principles*, 191-7. In contrast, the notion is discussed only in passing by Smith and Hogan (see at 103 and 117)

knowledge that those living around that objective have the status of civilians in the third category under discussion, knowledge constitutes an element per se of *mens rea*, an element that is normally required in addition to another, distinct, central element. Such is, for example, the case with crimes against humanity; there, in addition to the intent required for the underlying offence (such as murder, rape, torture, or extermination) the substantive criminal rules also require that the agent have knowledge of a factual circumstance, namely that those offences were part of a widespread or systematic attack directed against a civilian population (see, e.g., Article 7(1) of the IC.C Statute).

Let us see instances of the notions of knowledge.

2.11.1 Knowledge as part of intent can be found, for instance, in Article 85(3)(e) of the First Additional Protocol of 1977. It enumerates the grave breaches of the Protocol (which must be committed willfully' and cause 'death or serious injury to body or health') the fact of 'making a person the object of attack in the knowledge that he is hors de combat'. Here, knowledge means awareness of the requisite circumstances, namely that the person is hors de combat.

As another example of knowledge as awareness of acts, hence as part of intent, one can mention that, to be held responsible for complicity in planning or waging an aggressive war, it must be proved either that an accused participated in the preparation or execution of these plans (and in this case the criminal intent may be inferred from such participation), or that the accused was apprised of the plans, in addition to taking some sort of action furthering their implementation. In *Goring and others*, in considering the charges of crimes against peace made against Schacht (President of the Reichsbank and Minister without Portfolio until 1943), the IMT noted that he was responsible for rearmament of Germany, but this as such was not a crime; for it to become a crime it must be shown that he carried out rearmament as part of the Nazi plans to wage aggressive wars. However, the Tribunal found that while organizing rearmament, Schacht did not know of the Nazi aggressive plans; hence it acquitted him (at 307-10). A US Military Tribunal at Nuremberg took the same position and came to the same

conclusion in Krauch and others (1. G. Farben case), where it also held that the defendants' lack of knowledge of Hitler's aggressive plans proved that they lacked the requisite criminal intent (at 1115-17).

Another important instance where knowledge is required by international criminal rules is aiding and abetting an international crime (for example, a war crime such as killing a prisoner of war or an enemy civilian). Here criminal responsibility arises if the aider and abettor knows that his action will assist the commission of a specific crime by the principal. Various courts have taken this position.⁵⁴ As the ICTYTC put it in *Furundizija*, the accomplice need not share the mens rea of the principal: 'mere knowledge that his actions assist the perpetrator in the commission of the crime is sufficient to constitute mens rea in aiding and abetting the crime' (§236).⁵⁵

As will be shown below (11.4.4), knowledge is also required in most cases of command responsibility.⁵⁶ Thus, international rules on command responsibility require knowledge of circumstances, in the case of a commander who knows

⁵⁴ For instance, a US Military Tribunal I sitting at Nuremberg, in *Einsatzgruppen* (at 56S-73), two British courts respectively in *Schottfild* (at 64) and *Zyklon B* (at 100), the German Supreme Court in the *British Occupied Zone* in the *Synagoga* case (at 239), and the AC in *Tadić* (§229).

In *Veit Hilfian* the Council of Hamburg held in 1950 that in the case at issue there existed the requisite subjective element of the offence of complicity in a crime against humanity (persecution of Jews), in that the accused, a film director who had produced a strong anti-Semitic film at the behest of Goebbels, 'knew the intention of Goebbels, namely to justify through the film, beyond the usual propaganda, (he) the persecution of Jews against Jews that had been taken and planned' (at 156), and in addition 'had taken into account the possible materializing of the [adverse] consequences, of the kind in, the case, rise and fall of the Jewish people' (in general terms) by the Supreme Court [in the British Occupied Zone] (at 116).

⁵⁵ In this case the accused interrogated the victim while she was being subjected to rape and sexual assaults by another person; the TC found that the accused's presence; and continued interrogation of the victim while she was being subjected to violence amounted to aiding and abetting the crime, for the accused provided assistance, encouragement, or moral support to the sexual offender, and knew that these acts assisted the commission of the rape and sexual assault.

⁵⁶ The issue was well put by the US Judge Advocate in his instructions to a US Court Martial in *Medina*: '[A] commander is [...] responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities' (at 1732).

that his subordinates have committed crime, and yet fail to take any action to repress those crimes. He is criminally liable if, in addition to knowledge (or rather, in spite of that knowledge), he culpably fails to take any action for the prosecution and punishment of the culprits (intentional omission to take the prescribed action). Here, awareness of the fact that troops under the control or authority of the commander have committed international crimes is a mental element, constituting the preliminary *sine qua non* condition of intent, and is part and breach of intent.

2.11.2 Secondly, some international rules focus on result, and hence substantially consider knowledge as amounting or equivalent to recklessness. Thus, Article 85(3)(b) of the First Additional Protocol considers as a grave breach launching an indiscriminate attack affecting the Civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects'. A fairly similar definition is laid down in Article 8(2)(b)(iv) of the ICC Statute.

2.11.3 In the cases considered above, knowledge is not an autonomous criminal state of mind, but only as a means of entertaining criminal intent or recklessness. In contrast (and we thus move on to the third category), in some instances knowledge cannot be reduced to either of those classes of neutral state, and it remains indispensable as a subjective element on its own. One example has already been given above. It refers to crimes against humanity: the accused must know of a widespread or systematic attack against a civilian population. It is not that he intends the civilian population to be subject to the attack, nor that he knows that there is a risk of them being subjected to an attack—both of which are beside the point. What one wants, is simply to be sure that he knew of the attack. In these instances knowledge is irreducible to other mental elements and exists *per se* (see ICTR TC, Kayishtima, at 55133-4 and ICTY TC Kupreikic and others, at §556).

Finally, let it be emphasized that in ICL knowledge as awareness of criminal instances not mean awareness of the legal implications of those circumstances.

It only denotes cognizance of the factual circumstances envisaged in a particular international rule. International law, like most national systems, does not require awareness of the illegality of an act to the act to be regarded as an international crime. As we shall see (13.5.1) it starts from the assumption that everybody must know the law; it therefore it takes culpable even acts that were performed without the author being fully aware of the unlawfulness (as long as the required intent, recklessness, knowledge, etc. are there).⁵⁷ International law only takes into account knowledge, or lack of knowledge, of the law when the defence of mistake of law can be regarded as admissible, for the law on a particular matter is uncertain or unclear (see *infra*, 13.5.2). In other words, international rules do not attach importance to the subjective mental attitude of the perpetrator with regard to law, unless this subjective attitude coincides with the objective, condition of the law, namely its uncertainty.

2.12 SPECIAL INTENT (DOLOUS SPECIALIS)

International rules may require a special intent (*dolus specialis*, *dolus aggravatus*) for particular classes of crime. Such rules, in addition to providing for the intent to bring about a certain result by undertaking certain conduct (for example, death by killing), may also require that the agent pursue a specific goal that goes beyond the result of his conduct.

International rules require a special intent for genocide: the agent must possess 'the intent to destroy, in whole or in part a national, ethnical, racial or religious group'. Thus, it is not sufficient for the person to intend to kill, or cause serious mental or bodily harm, or deliberately inflict on a group seriously adverse and discriminatory conditions of life, or forcibly transfer children from one group to another, etc. It also must be proved that he did all this with the (furthest-and dominant) intention of destroying a group. For, as the German Federal Court of

⁵⁷ Burglwtz (.No. 2), th» British ludg» Advocate, in delinrating to the Military Court the scope ofmens tM in intrnational crinitis, stattd; '(Y)ou might think it difficull to say that any man could have a guilty mind in Mipect of his conduct it' he is not aware that his conduct is in breath of any law, or if there is no formal! led law to fit his participator)' conduct and to involve the breach thereof. But Me its RM goes a little further than that. If a man ought to have known that he was doing wrong, then the law presumes a guilty mind, a nd the requi rements ofthe doctrine of Mem Rea a ff fulfil I edifyou find the accused either knew that they were doing wrong or ought to have known; the fact that they may havii had no conscious thought of wrongdoing will not protect them from convict ion if a breach of law has been committed' (84-5).

justice (Bundesgerichtshof) stated in *forfic* on 30 April 1997, in the crime of genocide a single person is the object of an attack 'not as an individual but rather in his capacity as a member of a group whose social existence the perpetrator intends to destroy'.¹ the particular inhumanity that characterizes genocide as distinct from murder lies in that the perpetrator or perpetrators do not see the victim as a human being but only as a member of a persecuted group' (at 401).⁵⁸

Similarly, a special intent is required in some categories of crimes against humanity, namely persecution. Here, in addition to the intent necessary for the commission of the underlying offence (murder, rape, serious bodily assault, expulsion from a village, an area or a country, etc.) a discriminatory intent is called for, namely the will to discriminate against members of a particular national, ethnic, religious, racial, or other group. Asan ICTY TC put it in *Kupreikic* and others (<>634), and another TC restated it in *Kordic* and *Cerkez*. (25%14 and 220), the acts of the accused must have Lie in 'aimed at singling out and attacking certain individuals on discriminatory grounds', for the purpose of 'removal of those persons from the society in which they live alongside the perpetrator, or eventually from humanity itself. In *Bin skid*, another TC worded that intent as follows: 'the specific intent to cause injury to a human being because he belongs to a particular community or group' (§235).

The rules on crimes of international terrorism require a special intent; that of spreading terror in the population by killing, hijacking, blowing up buildings, etc. (see *infra*, 83.2). Also the rules criminalizing aggression require special intent (see *infra*, 7,3.3(b)).

In all these cases pursuance of a special goal is essential, while its full attainment is not necessary for the crime to be consummated. Clearly, the murder of dozens of Muslims, Kurds, or Jews may be termed genocide if the required special intent is present, regard less of whether the general purpose of destroying the group as such is achieved; the same holds true for terrorist attacks, which may amount to international crimes even if in fact a specific attack

⁵⁸ 20 That a specific or special intent is required for genocide has also been stressed in *Akayesu* (TJ §498), *Musemu* (TJ §§ 164-7), *Julistic*(AJ §§45-6); *Kristic* (TJ, §§569-99; AJ, §§24-38).

does not achieve the purpose of terrorizing the population; similarly, the forcible expulsion of a number of Muslims from their homes amounts to persecution even if not all Muslims are in fact driven out of the area.

2. 13. RECKLESSNESS

Recklessness or *dolus eventualis* is a state of mind where a person foresees that his or her action is likely to produce its prohibited consequences, and nevertheless willingly takes the risk of so acting. In this case the degree of culpability is less than in intent. There, the actor anticipates and pursues a certain result and in addition knows that he will achieve it by his action; here instead he only envisages that result as possible or likely and deliberately takes the risk: however, he does not necessarily will or desire the result. Recklessness, thus, is made up of foresight and a volitional act (deliberately taking the risk).⁵⁹

Instances of recklessness are clearly envisaged in some international rules. Thus, for instance, the rule on superiors' responsibility provides that the superior is criminally liable for the crimes of his subordinates if 'he consciously disregarded information which clearly indicated' that his subordinates were about to commit, or were committing, international crimes (see *infra*, 11.4.4). In this case the superior is liable to punishment for consciously having taken the risk, knowing that his subordinates were likely to commit or were committing crimes.

Furthermore, in the case of responsibility for crimes perpetrated by a multitude of persons pursuant to a common design, or joint criminal enterprise (see *infra*,

⁵⁹ According to the ICTY TC in *Gotić*, "The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he 'reconciles himself' or 'makes peace' with the likelihood of death. Thus, if the killing is committled with 'manifest indifference to the value of human life', even conduct of minimal risk can qualify as intentional homicide. Large scale killings that would be classified as reckless murders in the United States would meet the continental criteria of *dolus eventualis*. The Trial Chamber emphasises that the concept of *dolus eventualis* does not include a standard of negligence or gross negligence' (5587). In *Blaskić* and ICTY TC defined recklessness as the situation where 'the outcome is foreseen by the perpetrator as only a probable or possible consequence' of his conduct; according to the TC the agent takes 'a deliberate risk in the hope that the risk does not cause injury' (W2 -i).

A good definition of this notion—set out in the criminal law of the State of New York—can be found in RL 15.5(3) of the New York Penal Code, whereby 'A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offence when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.' See also Art. 2(Z)(c) of the US Model Penal Code cited above, at n. 6.

9.4.4), as the ICTY AC held in *Tadic* (AD, what is required is that, under the circumstances of the case, (i) it was foreseeable that a non-concerted crime might be perpetrated by one or other members of a group or collectivity jointly pursuing a criminal intent; and (ii) the accused consciously and deliberately took that risk (111217-8).

The notion of recklessness was also applied in many cases brought before German courts after the Second World War. These courts, which administered criminal justice under Control Council Law no. 10, were seized with crimes against humanity committed by Germans against other Germans. Most cases concerning to the Gestapo, with all the ensuing inhuman consequences. In many cases these courts held that, for the denunciation to amount to a crime against humanity, it was not necessary for the author of the denunciation to foresee and will all the nefarious consequences of his act; it was sufficient that he be aware of the authoritarian and arbitrary system of Nazi violence then prevailing in Germany and of the consequent risk that the victim would be subjected to persecution and great suffering. In this connection the German Supreme Court in the British Occupied Zone employed the German equivalent of the notion of recklessness, namely *Eventualwrtz*. (or *bedingter Vorsatz*).⁶⁰

⁶⁰ For instance, one can mention *K. and Afi*, decided by the Offenburger Tribunal (Lundgerkht) on 4 June 1946. In January 1944, K., the principal accused, a member of the Nazi party, was dining with friends and acquaintances. He had a discussion with K., a soldier who was on leave. Already tipsy, Konninger inveighed against the German leadership, noting among other things that the war was about to be lost. A few weeks later K. reported Konninger's tirade to various persons including some dignitaries attending a party given at a restaurant. As a result, the Gestapo arrested Konninger and brought him to trial. In July 1944 he was sentenced to death for defeatism and cowardice. He appealed; the Offenburger court submitted that he had not intended to have the victim prosecuted and punished for his utterances. The court held, however, that when he reported K.'s statement to the party meeting, 'he must expect that his words would have adverse consequences for Konninger. He caused proceedings against Konninger to be instituted, witnesses to be heard, and the victim eventually to be sentenced. [I]s entirely credible that the accused K. did not intend all that. However, he was to expect that this would be the result of his talk at the restaurant. He must foresee this result. He tacitly approved it. There was therefore recklessness on his part' (17). The court found K. guilty of a crime against humanity (persecution on political grounds) under Article I(c) of Control Council Law no. 10.

A very similar case is *IV.*, brought before the Tribunal of Waldshut (judgment of 16 February 1947 at 147).

K., decided on 27 July 1948 by the German Supreme Court in the British Occupied Zone, is also interesting. In February 1945 the accused, a member of the Waffen SS working at the headquarters (if the Gestapo) in Berlin, had denounced at his headquarters a Jewish businessman (M.) because the latter had gone to the apartments of 3 non-Jews. The denunciation led to the Jew being taken into preventive custody for three weeks, and the accused was found guilty of a crime against humanity. On appeal the Supreme Court confirmed the judgment. It held that under the relevant rules the accused had engaged in 'offensive conduct that was conscious and deliberate', he knew he was aware that he was bringing harm over the victim.

The Supreme Court in the British Occupied Zone also required recklessness in other cases not dealing with denunciations. For instance, in *L. and others* (the so-called Pig-cart parade case) the events had occurred on 5 May 1933. In a parade by SA (assault troopers) through the main streets of a small German town a prominent socialist senator and a Jewish inhabitant were publically humiliated and subjected to inhuman treatment (they were led along in a pig cart, with demeaning inscriptions hung around their necks and were vilified in various ways). The defendants took part in the parade. The Court held that, as far as the involvement of three accused went, 'it was inconceivable' that they, who were old officials of the Nazi party, 'did not at least think it possible and consider that in the case at issue, through their participation, persons were being assaulted by & system of violence and injustice; more is not required for the mental element' (at 232). In contrast, in the case of another defendant, who had simply followed the procession among the onlookers and in civilian clothes, the Court held that he was not guilty because he 'had not participated in causing the offence nor had he at least entertained *dolus eventualis* in taking part in the causation of the offence (at 234).⁶¹ It would thus seem that, according to the Court at least, some of the defendants took an unjustified risk of the victims being assaulted.

⁶¹ Another significant case is *I. and others*. On the night after Germany's partial capitulation (5 May 1945) four young German marines had tried to escape from Denmark back to Germany. The next day they were caught by Danes and delivered to the German troops, who court-martialled and sentenced three of them to death for desertion; on the very day of the general capitulation of Germany, i.e. 10 May, three were executed. The German Supreme Court found that some of the participants in the trial before the Court-Martial were guilty of complicity in a crime against humanity. According to the Supreme Court the glaring discrepancy between the offence and the punishment proved that the execution of the three marines had constituted a clear manifestation of the Nazis' brutal and intimidatory justice. The actus reus formed by the defendants involved a crime against humanity. As for the mental element of the crime, the Court held that intent [indisputably present in the minds of the judges who had sentenced the marines to death and of the military commander who had confirmed the sentence and ordered the execution] was necessary. Recklessness, too, is sanctioned in the case of the prosecutor, was sufficient: 'it is sufficient if the defendant concerned to have taken into account the possibility and have consented to the fact that his conduct would contribute to cause the resulting killing' (124).

In *Eschner*, the accused, an SS officer who had held an important position in the concentration camp (Gross-Rosen) between 1941 and 1945, was accused, among other things, of having requested Kapo V., a criminal by profession, to 'get rid of a camp inmate who had tried to escape; the inmate had probably died. The WdK-zburg Tribunal held that the accused knew the violent behaviour of Kapo V. and 'approvingly took into account that the inmate might suffer death as a result of the intended ill-treatment. Thus he willed recklessly the death of a man contrary to law'. However, in view of the fact that the inmate's death was not certain, the court found the accused guilty of 'attempted murder' by recklessness (253),

As for the case law of international tribunals, it bears mentioning *Blaskić* (where the AC held that to establish liability under Article 7(1.1) of the ICTY Statute for ordering the commission of a crime, it is required that a person 'orders an act or omission with the awareness of a substantial likelihood that a crime.' will be committed in the execution of that order', because ordering with such awareness has to be regarded as, 'accepting the crime', at 42) and *Stakić* (where the TC held that recklessness or *dolus eventus* could suffice for the crime of murder as a war crime and for extermination as a crime against humanity, at §§587 and 642).⁶²

2.14. CULPABLE OR GROSS NEGLIGENCE

Generally speaking, negligence entails that the person (i) is expected or required to abide by certain standards of conduct or take certain specific precautions with which any reasonable person should comply; (ii) acts in disregard of these standards or precautions; and (iii) either (a) does not advert at all to the risk of harm to another person involved in his conduct, which falls short of the standards or precautions (simple negligence), or (b) is aware of that risk but believes that it will not occur, and in addition takes a conduct that is blatantly at odds with the prescribed standards (gross negligence). Mere negligence is the least degree of culpability. Normally it is not sufficient for individual criminal liability to arise.

It would seem that, given the intrinsic nature of international crimes (which always amount to serious attacks on fundamental values) in ICL negligence operates as a standard of liability only when it reaches the threshold of gross or culpable negligence (*culpa gravis*). Given the nature of international crimes, the mental element under discussion only becomes relevant when there exist some specific conditions relating to the; objective elements of the crime; that is, the values attacked are fundamental and the harm caused is serious.⁶³

⁶² As for the ICTR, see for instance *Musema*, T.J., at ~ I Sand Knyishfma and *Ruiniiana*, T.I., at 614h.

⁶³ This definition of culpable negligence is in some respects at variance with that upheld in some common law and civil law countries. For instance, under the New York Penal Code, Rule 1.4(4): 'A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it consti-

That national legal system may penalize a mental state that is less grave than the one criminalized at the international level should not be surprising. Given the consequences following from, and the stigma inherent in, international crimes, it is only natural that international criminal rules should be more exacting, with regard to subjective requirements of the offence, than some? National criminal legislation.⁶⁴

Gross negligence is clearly required by the customary rules on superiors' responsibility (see *infra* 10.4) whereby a superior is responsible for the crimes of his subordinates if he did not know but 'should have known' that they were about to commit, or were committing, or had committed crimes. In this case, the superior was required to become cognizant of, and verify, all the information necessary to monitor the activities and the conduct of his subordinates. If he disregards these standards of conduct, he acts with gross negligence and is

tuMs i gross deviation from the standard oCcare that a reason a bit- person woJld i)bserve in the situatiou.' Clearly, this definition corresponds to what we termed above 'inadvertent negtigiici:', or culpa (L'I-ii (see *supra*.S.S)).

⁶⁴ Case law bears out the above international notion, John G. Schults case brought before a US Court of Military Appeals in 1952, deserves mention. Schults, driving a car, had struck and killed two Japanese pedestrians in 1950 in Japan (although Japan was still under US military occupation, this of course was not a war crime). The US Court stated the following: 'A careful perusal of the penal codes of most civilized nations leads us to the conclusion that homicide involving less than culpable negligence is not universally recognized as an offense. Even in those American jurisdictions—still relatively few in number—which have given statutory recognition to either negligent homicide or vehicular homicide, the degree of negligence required is often held to be 'culpable' or 'gross'—the same as that required for involuntary manslaughter. Imposing criminal liability for less than culpable negligence is a relatively new concept in criminal law and has not, as yet, been given universal acceptance by civilized nations', 4 CMR (1952), 115-1 d (CMA Lexis 61). On this case see also *infra* 1.4.3, n. &. A definition of negligence as a possible subjective element in international crimes can be found in the instructions given by the Judge Advocate to a Canadian Court Martial in Major A. G. StivBif. The defendant had, among other things, been charged with negligently performing his military duty while in Somalia in 1993. The particulars of his negligence were stated to be that he 'by issuing an instruction to his subordinates (that prisoners, could be abused, [he] failed to properly exercise command over his subordinates, as it was his duty to do'. As a result of his instructions, some of his subordinates had beaten up and killed a Somali civilian. In instructing the Court Martial on the notion of negligence, the Judge Advocate stated: '(A)s a matter of law the alleged negligence must go beyond mere error in judgment. Mere error in judgment does not constitute negligence. The alleged negligence must be either accompanied by a lack of zeal in the performance of the military duty imposed, or it must amount to a measure of indifference or a want of care by Major Seward in the matter at hand, or to an intentional failure on his part to take appropriate precautionary measures' (at 1081). The Court Martial found the defendant guilty on this count. In commenting on this finding by the Court Martial, the Court Martial Appeal Court of Canada stated that the Court Martial 'must be taken to have concluded that the respondent did issue an "abuse" order and that his doing so was no mere error in judgment. He himself confirmed that he was taking a "calculated risk" in doing so and that nothing in his training or in Canadian doctrine would permit the use of that word during the giving of orders' (*ibid.*). Arguably, recklessness more than negligence was at issue in this case.

consequently liable for dereliction of duty, if all the other conditions are fulfilled.⁶⁵ Culpable negligence has also been considered sufficient in other circumstances. A case where a court held negligence to be the mental element of a war crime is *Stinger and Cruises*, decided in 1921 by the Leipzig Supreme Court.⁶⁶ Another court also took into account negligence, this time with regard to crimes against humanity: *Hinselmann and others*, decided by the British Court of Appeal in the British Zone of Control in Germany, in 1947. A Trial Court had convicted a group of German doctors and police officers of crimes against humanity, under Control Council Law no. 10 (Article I(c)). It had found that they were concerned with carrying out, in 1944-45, sterilization operations 'on a number of persons of gypsy blood, to prevent the increase of the race' (three doctors had performed the operations and two police officers had induced persons to sign consent to the operations by threats). Counsel for one of the doctors, Giinther (a gynecological specialist); argued that there was no evidence that he knew that the gypsies were being sterilized on account of their race. In counsel's view, the case against Günter could only be one of negligence; however, negligence was not sufficient to constitute an offence under Control Council Law no. 10, which required

⁶⁵ Among the cases that maybe cited to support the applicability of gross negligence in cases of superior responsibility, *Schmitt* stands out. This case, concerning the commander of a concentration camp in Benkock, was brought before the Brussels Military Tribunal, which held in 1950 that 'although it is true that generally speaking jurisprudence does not consider that, in case of murder, simple lack of action or negligence are punishable, this however does no longer apply when a persons failure to act amounts to the non-fulfilment of a duty (...) in this case failure to take action amounts to material conduct sufficient for the realisation of criminal intent' (at 936-7).

⁶⁶ In the battle near Saarburg in Loraine between the French and the German Army, on 21 August 1914 the accused, Crusius, a captain of the German army, thought that Major-General Stenger had verbally ordered the killing of all French wounded. Acting under this erroneous assumption, he passed on this alleged order to his company. The Court concluded that Crusius was guilty of causing 'death through culpable negligence' (*fahrlässige Tötung*) and sentenced him to two years' imprisonment. The Court held that: 'the act of will which in the further course of events caused the objectively illegal outcome [...] included an act of carelessness which ran contrary to his duty, and neglect of the consideration required in the situation at hand which was perfectly reasonable to expect from the accused. Had he applied the care required of him, he would not have failed to notice what many of his men realized immediately, namely that the indiscriminate killing of all wounded represented an outrageous and by no means justifiable war manoeuvre [...] Captain Crusius was certainly familiar with the provisions of the field operating procedures which require a written order as the basis for troop command by the higher troop leaders, as well as the drill manual which makes the written order a rule, especially concerning orders for brigades and higher. This circumstance is also not entirely without significance, particularly in view of the personality of the accused who was described as a diligent, zealous and benevolent officer. In view of the accused's background and personality, he should have anticipated the illegal outcome which was easily demonstrated even if his mental and emotional states at the time were to be fully taken into consideration (at 2567-8)

extremely gross negligence. Hence, Günter, if he were to be convicted at all, could only be convicted under section 230 of the German Criminal Code.⁶⁷ The Prosecutor countered that Gaunter must have known the correct procedure in the case of sterilization, but made no enquiries, and saw no legal documents.⁶⁸

The Court of Appeals found that the appellant's frame of mind amounted to negligence: a German law of 1933, as amended in 1935, made it clear that sterilization operations were illegal unless: (i) they were performed to avert a serious threat to the life and health of the person operated upon, and with the consent of that person; or (ii) they were carried out in pursuance of an order of the Eugenics Court. The Court of Appeals noted that in the case at issue neither of these conditions was fulfilled.⁶⁹ The crucial point was, however, whether negligence (*Fahrlässigkeit*) could suffice for the requisite *mens rea* in the case of a crime against humanity. The Court of Appeals held that in the case at issue there was 'no suggestion that the operations were cruelly performed, and the evidence was inadequate to establish a degree of negligence which could have amounted in any event to a Crime against Humanity'. It consequently reduced the sentence of two years' imprisonment to six months.⁷⁰

⁶⁷ Under this provision 'Who ever through negligence causes bodily harm to another is punished by a pecuniary penalty or imprisonment up to three years' (see A. Schonke, *Strafgesetzbuch für das Deutsche Reich—Kommentar*, 2nd edn (Munich and Berlin: Beck, 1944), at 484; and see 172-3 for the notion of negligence).

⁶⁸ In addition, in his view there was no difference 'in the degree of negligence required to constitute an offence under Section 230 and that required to constitute an offence under [Control Council] Law 10'.

⁶⁹ The operations were of so special a nature, and the limits within which they could be legally performed so narrow, that Gunther was put upon his enquiry before he operated. His failure to make the necessary enquiry was negligence. Although 'negligence' as used by British lawyers (in English law there is negligence when the conduct of a person fails to measure up to an objective standard and the person ought to have foreseen the risk involved in his conduct; see, for instance, Smith and Hogan, 90-6.) and 'Fahrlässigkeit' as used by German lawyers are not co-extensive terms [in German law there is negligence when a person, acting in breach of a duty of precaution brings about a certain result he has not willed, and this result occurs either because the person is not cognizant of the breach of duty, or else is aware that the breach may occur, but trusts that the result will not materialize; see, for instance, Lescheck, *Lehrbuch*, at 563) there was undoubtedly *Fahrlässigkeit* on Günther's part; and the sterilization of the persons operated upon was a bodily injury.' (66-60)

⁷⁰ As mentioned above, counsel for the appellant had argued that negligence, if any, on the part of Günther was not serious enough to constitute an offence under Control Council Law no. 10; German law was therefore applicable. However, under this law, unless the rule under which a person was charged expressly

It may be clearly inferred from this finding that, for the Court of Appeals, crimes against humanity may result from negligence, provided, however, that negligence is gross.

Finally, it should be pointed out that there are also cases where culpable negligence has been so conceived of as to border on recklessness.⁷¹

2.15 THE ICC STATUTE

As stated above, the ICC Statute contains the only international provision setting out general definition of the subjective element of international crimes: Article 30. It provision envisages intent and knowledge as the only mental elements of those

stated that negligence was sufficient, the person could not be convicted of a criminal offence if the act constituting it was merely negligent and not intentional. The Court dismissed this argument. The Court of Appeal stated as follows: 'We do not accept the proposition that this is necessarily so [namely that negligence may not amount to the requisite subjective element unless this is explicitly provided for in the relevant law] where a charge under IControl Council Law 10 is tried in a Control Commission Court; but, in the present case, there is no suggestion that the operations were cruelly performed, and the evidence was inadequate to establish a degree of negligence which could have amounted in any event to a Crime against Humanity.' The Court consequently set aside Gunther's conviction under Control Council Law no. 10 and substituted it with a finding that he was guilty of an offence under section 230 of the German Criminal Code (at 60).

⁷¹ Thus in *Medina*, in 1971 a US military judge issued to the Court-Martial instructions with regard to command responsibility arising in a case where the commander allegedly had actual knowledge that troops or other persons subject to his control were in the process of committing war crimes (killing of innocent civilians in the Vietnamese village of My Lai), and wrongfully failed to take the necessary and reasonable steps to ensure compliance with the laws of war. The military judge pointed out that the legal requirements of international law 'placed upon a commander require actual knowledge plus a wrongful failure to act*. He then stated that the omission to exercise control must constitute culpable negligence and then pointed out that 'culpable negligence is a degree of carelessness greater than simple negligence. For purposes of making the distinction between the two, you are advised that simple negligence is the absence of due care. that is an omission by a person who is under a duty to exercise due care, which exhibits a lack of that degree of care for the safety of others which a reasonable, prudent commander would have exercised under the same or similar circumstances. Culpable negligence, on the other hand, is a higher degree of negligent omission, one that is accompanied by a gross, reckless, deliberate, or wanton disregard for the foreseeable consequences to others of that omission; it is an omission showing a disregard of human safety. It is higher in magnitude than simple inadvertence, but falls short of intentional wrong. The essence of wanton or reckless conduct is intentional conduct by way of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to others' (at 1732-4). See also above, the *Major A. G. Seward* case (cited in nt. 26)

crime (as set forth in Articles 6-8 of the ICC Statute). Article 30(1) provides that 'Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.' Paragraph 2 then defines those two notions.⁷²

Article 30 raises two problems. First, it does not refer expressly to recklessness or culpable negligence, although recklessness (*dolus eventualis*) may be held to encompass by the definition of intent laid down in paragraph 2. Secondly, it always requires both intent and knowledge, whereas there may be cases where only intent, as defined in the provision, is sufficient, and other cases where instead only knowledge (which, according to the definition given in the provision, may be regarded as equivalent to recklessness) would be sufficient.

To solve the first problem one may focus on the initial proviso of the rule ('unless otherwise provided'): whenever a provision of the Statute or a rule of international customary law requires a different mental element, this will be considered sufficient by the Court. For instance, Article 28(a) (i) provides for the responsibility of superiors where the 'military commander or person [...] owing to the circumstances at the time, should have known that the forces (under his effective command, control or authority) were committing or about to commit [...] crimes'. Plainly, this provision envisages culpable negligence (see *supra*, 3.8 as well as 11.4.4). This case would be covered by the proviso just referred to.

Nonetheless, when a specific substantive provision of the Statute does not specify the mental element required, one may deduce from Article 30 that one must take that substantive provision to require intent and knowledge. In this manner the Statute may eventually require a mental element higher than that set

⁷² Para. 2 provides that: 'For the purposes of this article, a person has intent where (a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.'

Para. 3 provides that: 'For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'

down in customary law. Indeed, differences may arise between customary international law and treaty law whenever a customary rule concerning a specific crime considers as a sufficient requirement for that crime a subjective element other than intent (for instance, culpable negligence).

As for the second problem (the use of the conjunctive 'and'), one ought to note that in international law the standard of construction applies that a purely grammatical construction must yield to a logical interpretation whenever this is dictated by the principle of effectiveness (*ut res magis valeat quam pereat*) and is consonant with the object and purpose of the rule. It is therefore admissible to construe the word 'and' as also including the word 'or' when this is logically required.⁷³

2.16 JUDICIAL DETERMINATION OF THE MENTAL ELEMENT

As in national law, in ICL a culpable state of mind is normally proved in court by circumstantial evidence. In other words, one may infer from the facts of the case whether or not the accused, when acting in a certain way, willed, or was aware, that his conduct would bring about a certain result. To put it differently, one may normally deduce from factual circumstances whether the action contrary to ICL was accompanied by a mental attitude denoting some degree of fault.

This is the position taken by national and international courts. For instance, one can refer to the statement made by the Judge Advocate addressing a Canadian Military Court in *Johann Neitz*. The question at issue was whether the accused, who had shot at a member of the Royal Canadian Air Force taken prisoner by Germans, wounding the prisoner without killing him, had intended to cause his death. The Judge Advocate put the issue to the Military Court as follows:

Intention is not capable of positive proof, and, accordingly, it is inferred from the overt acts. Evidence of concrete acts is frequently much better evidence than the

⁷³ An application of this rule of construction was made by an ICTY TC in *Tadić*, decision of 7 May 1997, §§712-13.

evidence of an individual for, after all, an individual alone honestly knows what he is thinking. The Court cannot look into the mind to see what is going on there. The individual may protest vehemently what his intentions were, but such evidence is subject to human frailty and human perfidy. Accordingly, intention is presumed from the overt act. It is a simple application of the principle that actions speak louder than words, and, I add, often more truthfully. It is also a well-established maxim of law that a man is presumed to have intended the natural consequences of his acts. If one man deliberately strikes another over the head with an axe, the law presumes he intended to kill the other. Similarly so, if one man deliberately shoots a gun at another, an intent to kill will be presumed [...] If a man points a gun at another and deliberately fires, it is presumed that he intends to kill the other. However, this is a presumption of fact, but it may be rebutted' (at 209). (The Court found the accused had committed a war crime with intent to kill and sentenced him to life imprisonment.)⁷⁴

Interestingly, in *Jelisić* an ICTY TC, in order to establish whether the accused had entertained the special intent required for genocide, examined various statements he had made to the effect that he wished to exterminate Muslims, for he hated them and wanted to kill them all (§§102-4). The Court concluded, however, that these utterances revealed a disturbed personality and consequently, for lack of the requisite special intent, the acts of the accused were not 'the physical expression of an affirmed resolve to destroy in whole or in part a

⁷⁴ A court of Bosnia and Herzegovina took the same approach in *Tepeš* with regard to intent. In setting out the mental element of the crimes of torture and murder of civilians, the Sarajevo Cantonal Court stated that "The accused perpetrated the crime deliberately; he was aware that together with others from Rajko Kuj's group he was taking part in torture, beatings and killing of prisoners. Since the accused repeated these actions many times, he definitely wished to do that and was aware that repeated beatings of prisoners with hard objects, fists and boots in vital parts of their bodies can certainly result in their death. By repeating these actions it is evident that the accused wanted these people killed' (at 7).

With regard to the subjective element of command responsibility, an ICTY TC pointed out in *Delalić* and others, that it could be established 'by way of circumstantial evidence. The TC pointed out that 'in the absence of direct evidence of the superior's knowledge of the offences committed by his subordinates, such knowledge cannot be presumed, but must be established by way of circumstantial evidence' (8386).

Again, with regard to 'knowledge' that the subordinates were committing or had committed crimes in the case of command responsibility, an ICTY TC stated in *Kordić and Cerkez* that, 'Depending on the position of authority' held by a superior, whether military or civilian, *de jure* or *de facto*, and his level of responsibility in the chain of command, the evidence required to demonstrate actual knowledge may be different. For instance, the actual knowledge of a military commander may be easier to prove considering the fact that he will presumably be part of an organized structure with established reporting and monitoring systems. In the case of *de facto* commanders of more informal military structure, or of civilian leaders holding *de facto* positions of authority, the standard of proof will be higher' (§428).

group as such' (§107). The AC, while holding that the TC had erred in acquitting the defendant of genocide (Jelusic, Aj, §§53-72), surprisingly did not uphold the Appellant's request that the case be remitted to a TC for retrial (§§73-7). It held that such remittal was 'not in the interests of justice' (§77).

2.17 THE NOTION

War crimes are serious violations of customary or treaty rules belonging to the corpus of the international humanitarian law of armed conflict (IHL). As the AC of the ICTY stated in Tadic (IA), (i) war crimes must consist of 'a serious infringement' of an international rule, that is to say 'must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim'; (ii) the rule violated must either belong to the corpus of customary law or be part of an applicable treaty; and (iii) 'the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule' (§94); in other words, the conduct constituting a serious breach of international law, in addition to being an interstate violation involving the responsibility of the state to which the serviceman belongs, must be criminalized.

In the same decision the AC gave the following example of a non-serious violation: 'the fact of a combatant simply appropriating a loaf of bread in an occupied village' would not amount to such a breach, 'although it may be regarded as falling foul of the basic principle laid down in Art. 46(1) of the [1907] Hague Regulations [on Land Warfare] (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory' (§94).

War crimes may be perpetrated in the course of either international or internal armed conflicts; that is, civil wars or large-scale and protracted armed clashes breaking out within a sovereign state. Traditionally, war crimes were held to embrace only violations of international rules regulating war proper; that is international armed conflicts and not civil wars. After the ICTY AC decision in

Tadic (IA) of 1995 (see *infra*, 4.3), it is now widely accepted that serious infringements of international humanitarian law on internal armed conflicts may also be regarded as amounting to war crimes proper, if the relevant conduct has been criminalized. As evidence of this new trend, suffice it to mention Article 8(2) (c-f) of the ICC Statute.

IHL is a vast body of substantive rules comprising what are traditionally called 'the law of the Hague' and 'the law of Geneva'. The former set of rules includes some Hague Conventions of 1899 or 1907 on international warfare. These rules, in addition to providing for the various categories of lawful combatants, primarily regulate combat actions (means and methods of warfare) and the treatment of persons who no longer take part in armed hostilities (prisoners of war). The so-called law of Geneva' comprises the various Geneva Conventions (at present the four Conventions of 1949 plus the two Additional Protocols of 1977), and is essentially designed to regulate the treatment of persons who do not, or no longer, take part in armed conflict (civilians, the wounded, the sick and shipwrecked, as well as prisoners of war). Furthermore, Article 3, common to the four Geneva Conventions and the Second Additional Protocol, regulate, internal armed conflict. The Third Geneva Convention of 1949 also regulates the various classes of lawful combatants, thereby updating the Hague rules. In addition, the First Additional Protocol of 1977 to some extent updates those rules of the Hague law which deal with means and methods of combat, for the sake of sparing civilians as far as possible from armed hostilities. It is thus clear that the traditional distinction between the two sets of rules is fading away; even assuming it has not become obsolete, its purpose now is largely descriptive.

War crimes may be perpetrated by military personnel against enemy servicemen or civilians, or by civilians against either members of the enemy armed forces or enemy civilians (for instance, in occupied territory). Conversely, crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes.' Such offences may nonetheless fall within the ambit of the military law of the relevant belligerent.

2.18 THE NEED FOR A LINK BETWEEN THE OFFENCE AND AN ARMED CONFLICT

Criminal offences, to amount to war crimes, must also have a link with an international or internal armed conflict. Many courts, chiefly the ICTY² and the ICTR, have restated this proposition, which can easily be deduced from the whole body of international humanitarian law of armed conflict. This applies in particular to offences committed by civilians, although courts have also required the link or nexus with an armed conflict in the case of crimes perpetrated by members of the military.

Special attention should be paid to crimes committed by civilians against other civilians. They may constitute war crimes, provided there is a link or connection between the offence and the armed conflict. In the absence of such a link, the breach simply constitutes an 'ordinary' criminal offence under the law applicable in the relevant territory.

2.19 ESTABLISHING WHETHER A SERIOUS VIOLATION OF IHL HAS BEEN CRIMINALIZED

As pointed out above, in order for a serious violation of IHL to become a war crime, it is necessary that the violation be criminalized. The question then becomes one of how to determine whether this is the case.

The point of departure is the observation that the failure of the relevant rules of IHL to provide for any courts or criminal proceedings in the event of the rule being breached is not determinative of the issue. What matters is that criminal or military courts have in fact adjudicated breaches of IHL. Various courts rightly held this view.

A second, general and preliminary, remark concerns the need to avoid the following simplistic proposition: to determine whether a particular act may be termed as war crime, one need only establish that the act breaches IHL, since all violations of the laws of war are war crimes under national law and military

manuals. The Judge Advocate at a Canadian Military Court pronouncing in 1946 on a war crime in Johann Nets took this view. After noting that, under Canadian law, a war crime was any 'violation of the laws and usages of war committed during any war in which Canada had been or may be engaged at any time', the Judge Advocate added

The test of criminal responsibility is therefore not properly applicable, and the issue upon any charge is not 'did the accused commit a crime?' as we understand the word 'crime' under our criminal law, but 'did he violate the laws and usages of war'? (195-6).

This approach is not convincing, as not all violations of international humanitarian law amount to war crimes, as pointed out in Tadic (IA) (§94), although they may give rise to state responsibility.

These points having been established, several situations need to be distinguished. First, it may be that a violation has been consistently considered a war crime by national or international courts (this is, for example, true for the most blatant violations, such as unlawfully killing prisoners of war or innocent civilians, shelling hospitals, refusing quarter, killing shipwrecked or wounded persons, and so on). The existence of war crimes cases on a particular matter may sometimes be considered sufficient for holding the breach to be a war crime. However, strictly speaking, the existence of a few (possibly isolated) war crimes decisions may not be enough. It would be better if it were possible to show that the breach is considered a war crime under customary international law, in which case there would have to be widespread evidence that states customarily prosecute such breaches as war crimes and that they do so because they believe themselves to be acting under a binding rule of international law (*opinio juris*).

A second possible instance is that a breach is termed a war crime by the Statute of an international tribunal. In this case, even if the breach has never been brought before a national or international tribunal, it may justifiably be regarded

as a war crime—or, at least, as a war crime falling under the jurisdiction of that international tribunal.

A third, and more difficult, category is when the case law and statutes of international tribunals are absent or silent on the matter. In such a case, how is one to determine whether violating a prohibition of international humanitarian law amounts to a war crime? In light of the case law (see *List and others* (Hostages case), *John G. Schultz*, *Tadic* (IA), and *Blaskic*, to which I will presently return) and the general principles of ICL, one is entitled, in seeking an answer to the question, to examine: (i) military manuals; (ii) the national legislation of states belonging to the major legal systems of the world; or, if these elements are lacking, (iii) the general principles of criminal justice common to nations of the world, as set out in international instruments, acts, resolutions and the like; and (iv) the legislation and judicial practice of the state to which the accused belongs or on whose territory the crime has allegedly been committed.

Let us now take a look at how courts have gone about this matter.

In *List and others* (Hostages case) the defendants were high-ranking officers in the German armed forces charged with war crimes and crimes against humanity. They were accused of offences committed by troops under their command during the occupation of Greece, Yugoslavia, Albania, and Norway, these offences mainly being reprisal killings, purportedly carried out in an attempt to maintain order in the occupied territories in the face of guerrilla opposition, or wanton destruction of property not justified by military necessity. They claimed that Control Council Law no. 10, on the basis of which they stood accused, was an *ex post facto* act and retroactive in nature. The Tribunal rejected the contention, holding that the crimes defined in that Law were crimes under pre-existing rules of international law, 'some by conventional law and some by customary law'. It went on to state that the war crimes at issue were such under the Hague Regulations of 1907 and then added

In any event, the practices and usages of war which gradually ripened into recognized customs with which belligerents were bound to comply, recognized the crimes specified herein as crimes subject to punishment. It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally (634-5).

The Tribunal then noted that the acts at issue were traditionally punished, adding that, although no courts had been established nor penalties provided for the commission of these crime, 'this is not fatal to their validity. The acts prohibited are without deterrent effect unless they are punishable as crimes' (635).

It was the AC of the ICTY that best addressed the issue under discussion, in Tadic (IA). The question in dispute was whether the accused could be held criminally liable for breaches of international humanitarian law allegedly committed in an internal armed conflict; in other words, whether he could be held responsible for war crimes perpetrated in a civil war. The AC first considered whether there were customary rules of international humanitarian law governing internal armed conflicts, and answered in the affirmative (§§96-127). It then asked itself whether violations of those rules could entail individual criminal responsibility. For this purpose, the Court examined national cases, military manuals, national legislation, and resolutions of the UN Security Council. It concluded in the affirmative (§§128-34) and then added that in the case at issue this conclusion was fully warranted 'from the point of view of substantive justice and equity', because violations of IHL in internal armed conflicts were punished as criminal offences in the countries concerned, that is both the old Socialist Federal Republic of Yugoslavia and in Bosnia and Herzegovina, As the Court noted, 'Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law' (§135; see also §136).

An ICTY TC returned to the question in *Blaskic*. The defense contended that violations of common Article 3 of the four 1949 Geneva Conventions (on internal armed conflict) did not entail criminal liability. The TC dismissed this contention by noting, first, that those violations were envisaged in Article 3 of the ICTY Statute, conferring jurisdiction on the Tribunal, and secondly, that the criminal code of Yugoslavia, taken over in 1992 as the criminal code of Bosnia and Herzegovina (the place where the alleged offences had been committed), provided that war crimes perpetrated either in international or in internal armed conflicts involved the criminal liability of the perpetrator (§176).⁸

2.20 THE OBJECTIVE ELEMENTS

2.20.1 GENERAL

In order to identify the main legal features of the prohibited conduct, it is necessary to consider in each case the content of the substantive rule that has been allegedly breached. This should not be surprising. No authoritative and legally binding list of war crimes exists in customary law. An enumeration can only be found in Article 8 of the ICC Statute, which is not, however, intended to codify customary law. It should also be noted, more generally, that the principle of legality or *nulium crimen sine lege* (traditionally laid down in national legal systems, particularly those of civil law countries) is upheld in ICL only in a limited way (see *supra*, 2.3). Hence in each case the objective element of the crime can essentially be inferred from the substantive rule of international humanitarian law allegedly violated.

For a subcategory of war crimes, namely those acts that are provided for in terms and defined by the 1949 Geneva Conventions and Additional Protocol I of 1977 as 'grave breaches', a further requirement is provided for: such acts must be committed within the context of an international armed conflict. The ICTY AC held in *Tadic* (IA) that a customary rule was *in statu nascendi*, that is in the process of forming, whereby 'grave breaches' could also be perpetrated in internal armed conflicts; instead, according to Judge Abi-Saab's Separate Opinion

in that case, such a rule had already evolved. At present, in light of the recent trends in the legislation or practice of states, the contention is perhaps warranted that a customary rule has indeed emerged. However, it would seem plausible to interpret this rule to the effect that it only confers on states the power to search for and bring to trial or extradite alleged authors of grave breaches committed in internal armed conflicts; the rule does not go so far as to also impose upon states an obligation to seek out and try or extradite those alleged authors (as is instead the case for grave breaches perpetrated in international armed conflicts).

2.20.2 CLASSES OF WAR CRIME

War crimes can be classified under different headings. The following classification is based on some objective criteria, and may prove useful, although of course it only serves descriptive purposes: (i) war crimes committed in international armed conflicts (that is, between two or more states, or between a state and a national liberation movement, pursuant to Article 1(4) of the First Additional Protocol of 1977); and (ii) war crimes perpetrated in internal armed conflicts (that is, large-scale armed hostilities, other than internal disturbances and tensions, or riots or isolated or sporadic acts of armed violence, between state authorities and rebels, or between two or more organized armed groups within a state). Traditionally, states and courts have held that war crimes may only be committed during wars proper. Violations of international law committed in the course of internal armed conflicts were not criminalized. Thus, a glaring and preposterous disparity existed. As stated above, in 1995, a seminal judgment of the ICTY AC in Tadic (IA) (§§97-137) signaled a significant advance: the AC held that war crimes could be committed not only in international armed conflicts but also in internal armed conflicts. Since then the view has been generally upheld and the ICC Statute definitively consecrates it in Article 8(2) (c)-(f).

Both classes include the following:

1. Crimes committed against persons not taking part, or no longer taking part, in armed hostilities. In practice by far the most numerous crimes are committed against civilians,¹⁰ or armed resistance movements in occupied territory,¹¹ and include sexual violence against women.¹² In particular, they are perpetrated against persons detained in internment or concentration camps.¹³ They are also committed against prisoners of war.¹⁴

In the case of international armed conflicts, serious war crimes against one of the 'protected persons' (wounded, shipwrecked persons, prisoners of war, civilians on the territory of the Detaining Power or subject to the belligerent occupation of an Occupying Power) or 'protected objects' provided for in the 1949 Geneva Conventions, as well as the First Additional Protocol are termed 'grave breaches'. Grave breaches are defined in the following provisions: Articles 50, 51, 130, and 147 of the First, Second, Third, and Fourth Geneva Conventions, respectively, as well as in Article 85 of the First Additional Protocol. They include willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. The essential feature of 'grave breaches' is that they are subject to 'universal jurisdiction' of all states parties to the Convention and the Protocol: any contracting state is authorized as well as obliged to search for and bring to trial—or, alternatively, extradite to a requesting state—any person suspected or accused of a grave breach (whatever his or her nationality and the territory where the grave breach has allegedly been perpetrated) who happens to be on its territory.

In the case of internal armed conflict, ¹⁵ the same violations are prohibited and may amount to a war crime if they are serious. In this connection reference should be made to Article 3 common to the four 1949 Geneva Conventions, Additional Protocol II (especially Article 4 thereof), ¹⁶ as well as Article 4 of the ICTR Statute.¹⁷ As noted above, there is no treaty provision characterizing violations of these rules as 'grave breaches' and consequently attaching to such classification all the ensuing consequences at the procedural level (power and duty to exercise universal jurisdiction over the alleged offender). Nor, it would

seem, has a customary rule evolved imposing upon states (and the rebellious group engaged in a civil war) the obligation to search for and bring to trial (or extradite) persons suspected or accused of a grave breach perpetrated in an internal armed conflict.

2. Crimes against enemy combatants or civilians, committed by resorting to prohibited methods of warfare. Examples include intentionally directing attacks against the civilian population in the combat area or individual civilians in the combat area not taking part in hostilities; committing acts or threats of violence the primary purpose of which is to spread terror among the civilian population; intentionally launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians, or damage to civilian objects; intentionally making non-defended localities or demilitarized zones the object of attack; intentionally making a person the object of attack in the knowledge that he is hors de combat, intentionally attacking medical buildings, material, medical units and transport, and personnel; intentionally using starvation of civilians, as a method of warfare by depriving civilians of objects indispensable to their survival, including willfully impeding relief supplies; intentionally launching an attack in the knowledge that such attack will cause widespread, long-term, and severe damage to the natural environment; utilizing the presence of civilians or other protected persons with a view to rendering certain points, areas, or military forces immune from military operations; declaring that no quarter will be given, that is, that enemy combatants will be killed and not taken prisoner.

It should be noted that, the substantive rules of IHL on this matter being purposely loose, so far very few cases have been brought before national or international courts concerning alleged violations of rules on the conduct of hostilities entailing the criminal liability of the perpetrators.¹⁸ Strikingly, more cases involving the alleged breach of rules of IHL on the conduct of hostilities have been brought before interstate courts, pronouncing on state responsibility.

3. Crimes against enemy combatants and civilians, involving the use of prohibited means of warfare. Examples include employing weapons, projectiles, and materials which are of a nature to cause superfluous injury or unnecessary suffering; employing poison or poisoned weapons, or asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices; using chemical or bacteriological weapons; employing expanding bullets or weapons, the primary effect of which is to injure by fragments not detectable by X-rays, or blinding laser weapons,²⁰ employing booby traps or land mines indiscriminately, that is, in such away as to hit both combatants and civilians alike, or anti-personnel mines which are not detectable; employing napalm and other incendiary weapons in a manner prohibited by the 1980 Protocol III to the aforementioned Convention (for instance, by making a military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons').

What I have pointed out above, with regard to breaches of international rules on methods of war, a fortiori applies to violations of rules on means of warfare, the latter category of rules being even more difficult to apply than the legal standards on the conduct of hostilities.

4. Crimes against specially protected persons and objects (such as medical personnel units or transport, personnel participating in relief actions, humanitarian organizations such as the Red Cross, or Red Crescent, or Red Lion and Sun units, UN personnel belonging to peace-keeping missions, etc.).

5. Crimes consisting of improperly using protected signs and emblems (such as a flag of truce; the distinctive emblems of the Red Cross, or Red Crescent, or Red Lion and Sun, plus the emblem provided for in the Third Additional Protocol of 8 December 2005 (the emblem 'composed of a red frame in the shape of a square on edge on a white ground'); perfidious use of a national flag or of military uniform and insignia, etc.).

6. Conscripting or enlisting children under the age of fifteen years or using them to participate actively in hostilities (in either international or internal armed

conflicts). According to the AC of the SCSL (Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction, §53) 'child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictment'(against the defendants in that case). This proposition was restated by a TC of the SCSL in Brima and others (§§727-8), where the elements of the crime were set out (§729).

2.20.3 THE SUBJECTIVE ELEMENTS

The subjective—or mental—element (*mens rea*) of the crime is sometimes specified by the international rule prohibiting a certain conduct.

Thus, for instance, Article 130 of the Third Geneva Convention of 1949 (on prisoners of war) enumerates among the 'grave breaches' of the Convention the 'willful killing [of prisoners of war], torture or inhuman treatment, including biological experiments' as well as 'willfully causing great suffering or serious injury to body or health' of a prisoners of war, or 'willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in [the) Convention'. The word 'willful' obviously denotes criminal intent, namely the intention to bring about the consequences of the act prohibited by the international rule (for instance, in the case of 'willful killing' proof must be produced of the intention to cause the death of the victim; in the case of 'willfully causing great suffering' it must be proved that the perpetrator had the intention to cause great suffering, etc.). The same holds true for other similar provisions, such as Article 147 of the Fourth Geneva Convention (on civilians), as well as provisions of other treaties, such as Article 15 of the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict. (This provision, in enumerating the serious violations of the Protocol entailing individual criminal liability, makes such liability contingent upon the fact that the author of the 'offence' has perpetrated it 'intentionally'.)

One can also mention Article 85(3) of the First Additional Protocol of 1977. This provision subordinates the criminalization of such acts as attacking civilians or

undefended localities, or demilitarized zones, or perfidiously using the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun, to three conditions: (i) the acts must be committed 'willfully'; (ii) they must be carried out in violation of the relevant provisions of the Protocol; and (iii) they must cause death or serious injury to body or health. Thus, the provisions clearly require intent or at least recklessness (so-called *dolus eventualis*), which exists whenever somebody, although aware of the likely pernicious consequences of his conduct, knowingly takes the risk of bringing about such consequences (see *supra*, 3.7).

For other acts, the same provision also requires 'knowledge' as a condition of criminal liability. This, for instance, applies to launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects' (Article 85(3) (b)); or to launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects' (Article 85(3) (c)). As we have seen (3.6.1), in criminal law 'knowledge' is normally part of 'intent' (*dolus*) and refers to awareness of the circumstances forming part of the definition of the crime. However, in the context of the provision at issue, 'knowledge' must be interpreted to mean 'predictability of the likely consequences of the action' (recklessness or *dolus eventualis*). Therefore, for an act such as that just mentioned to be regarded as a war crime, evidence must be produced not only of the intention to launch an attack, for instance an attack on a military objective normally used by civilians (e.g. a bridge, a road, etc.), but also of the foreseeability that the attack was likely to cause excessive loss of life or injury to civilians or civilian objects. In other instances, international rules require knowledge in the sense of awareness of a circumstance of fact, as part of criminal intent (*dolus*). Thus, Article 85(3) (e) of the same Protocol makes it a crime to willfully attack a person 'in the knowledge that he is hors de combat'.

When international rules do not provide, not even implicitly, for a subjective element, it would seem appropriate to hold that what is required is the intent or,

depending upon the circumstances, recklessness as prescribed in most legal systems of the world for the underlying offence (murder, rape, torture, destruction of private property, pillage, etc.). Often, international courts and tribunals have gradually identified the requisite mental element based on the nature of the underlying offence. Thus, for instance, in the case of murder as a war crime, the jurisprudence of the ICTR and the ICTY has consistently held that what is required is that 'the death of the victim must result from an act or omission of the accused committed with the intent either to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death' (Krstic, TJ, §483; Blaskic, T}, §217; Kvočka and others, TJ, §132; Stakic, TJ, §§584-6). In other words, either intent or at least *dolus eventualis* or recklessness (see *supra*, 3.7) are required.

Generally speaking, it appears admissible to contend that, for at least some limited categories, of war crimes, gross or culpable negligence (*culpa gravis*) may be sufficient; that is, the author of the crime, although aware of the risk involved in his conduct, is nevertheless convinced that the prohibited consequence will not occur (whereas in the case of 'recklessness' or *dolus eventualis* the author knowingly takes the risk). *Supra*, 3.8. Indeed, the consequent broadening of the range of acts amenable to international prosecution is in keeping with the general object and purpose of international humanitarian law. This modality of *mens rea* may, for instance, apply to cases of command responsibility (see *infra*, 11.4.4), where the commander should have known that war crimes were being committed by his subordinates. Also, it could be contended that it may apply to such cases as wanton destruction of private property. In contrast, it may seem difficult to consider culpable negligence a sufficient subjective element of the crime in cases involving the taking of human life.

2.20.4 THE DEFINITION OF WAR CRIMES IN THE ICC STATUTE

Generally speaking, the Rome Statute appears to be praiseworthy in many respects as far as substantive criminal law is concerned. Many crimes have been

defined with the required degree of specificity, and the general principles of criminal liability have been set out in detail.

As far as war crimes more specifically are concerned, it is no doubt commendable that they have been regulated in such a detailed manner. Furthermore, the notion of war crimes has rightly been extended to offences committed in time of internal armed conflict. However, in some areas the relevant provision of the Rome Statute, Article 8, marks a retrograde step with respect to existing international law.

First of all, there is a perplexing phrase, 'within the established framework of international law', that appears in Article 8(2) (b) and (e), dealing with crimes likely to be perpetrated while in combat (that is, crimes involving the wrongful use of means or methods of combat), respectively in international armed conflicts and in non-international armed conflicts. These two provisions are worded as follows:

(For the purpose of this Statute 'war crimes' means] Other serious violations of the laws and customs applicable in international armed conflict (in armed conflicts not of an international character; lit (e)], within the established framework of international law, namely, any of the following acts.

It is notable that in the other provisions of Article 8 no mention is made of 'the established framework of international law'. Hence one could argue that there is only one possible explanation of this odd phrase: the offences listed in the two aforementioned provisions are to be considered as war crimes for the purpose of the Statute only if they are regarded as such by customary international law. In other words, whilst for the other classes of war crimes the Statute confines itself to setting out the content of the prohibited conduct, and the relevant provision can thus be directly and immediately applied by the Court, in the case of the two provisions under consideration things are different. The Court may consider that the conduct envisaged in these provisions amounts to a war crime only if and to the extent that general international law already regards the offence as a war crime. It would follow, for example, that 'declaring that no quarter will be given'

(Article 8(2)(b)(xii)) will no doubt be taken to amount to a war crime, because indisputably denial of quarter is prohibited by customary international law and, if effected, amounts to a war crime. By contrast, offences such as "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" (Article 8(2)(b)(viii)) cannot ipso facto be regarded as war crimes. The Court will first have to establish whether: (i) under general international law they are considered as breaches of the international humanitarian law of armed conflict; and, in addition, (ii) whether under customary international law their commission amounts to a war crime.

Were the above explanation regarded as sound, it would follow that for two broad categories of war crime the Statute does not set out a self-contained legal regime, but presupposes a mandatory examination, by the Court, on a case-by-case basis, of the current status of general international law. This method, while commendable in some respects, may, however, entail that the Statute's provisions eventually constitute only a tentative and interim regulation of the matter, for the final say rests with the Court's determination. Whether or not such a regulation is considered satisfactory, it seems indisputable that it leaves greater freedom to sovereign states or, to put it differently, makes the net of international prohibitions less tight and stringent.

Secondly, the legal regulation of means of warfare seems to be narrower than that laid down in customary international law.

The use in international armed conflict of modern weapons which (a) cause superfluous injury or unnecessary suffering; or (b) are inherently indiscriminate, is not banned per se and therefore does not amount to a crime under the ICC Statute—whereas arguably such use constitutes a war crime under customary international law, at least in those instances where the weapon at issue or the way it is used indisputably infringes those two principles or one of them." Thus, in the event the two principles are deprived of their overarching legal value, at least

with regard to individuals (the principles still act as standards applicable to states, with the consequence that those states that breach them incur international responsibility). This seems all the more questionable because even bacteriological weapons, which undoubtedly are already prohibited by general international law, might be used without entailing the commission of a crime falling under the jurisdiction of the Court (it would seem that the use of this category of weapons is not covered by the ban on 'asphyxiating, poisonous or other gases and all analogous liquids, materials or devices', contained in Article 8(2)(b)(xviii) and clearly relating to chemical weapons only).

A similar criticism may be made of the sub-article on damage to the environment. Under Article 8(2) (b) (IV)) intentionally launching an attack in the knowledge that such attack will cause 1...] Widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' constitutes a war crime. It should be noted that Article 55(1) of Additional Protocol I—to which any provision on environmental war crimes must accord a sort of 'precedential' value—provides

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition on the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

Article 55 makes no mention of the 'excessive' or disproportionate character of the attack nor of 'anticipated military advantage' (let alone of the 'direct overall military advantage anticipated', a phrase that gives belligerents a very great latitude and renders judicial scrutiny almost impossible). Moreover, in paragraph 2 it prohibits reprisals by way of attack against the natural environment. Article 8 of the ICC Statute therefore takes a huge leap backwards by allowing the defense that 'widespread, long-term and severe damage to the natural environment' caused by the perpetrator—not just damage, but widespread, long-term and severe damage, intentionally caused—was not 'clearly excessive'

(perhaps it was excessive, but not clearly excessive') in relation to the concrete and direct overall military advantage anticipated. This seems indefensible.

Thirdly, one may entertain some misgivings concerning the distinction, upheld in Article 8, between the regulation of international armed conflict, on the one side, and internal conflicts on the other. In so far as Article 8 separates the law applicable to the former category of armed conflict from that applicable to the latter category, it is somewhat retrograde, as the current trend has been to abolish the distinction and to have simply one corpus of law applicable to all conflicts. It can be confusing— and unjust—to have one law for international armed conflict and another for internal armed conflict.

More specific flaws may be discerned. For instance, when it comes to crimes in internal armed conflicts perpetrated against adversaries hors de combat (combatants who have laid down their weapons), the wounded, the sick, as well as civilians, the relevant provision (Article 8(2)(c)) admits that such crimes may be committed in broad categories of armed conflict (any 'armed conflict not of an international character', excluding 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'). In contrast, the threshold required by the provision for crimes committed in combat is higher: Article 8(2)(f)) stipulates that the relevant provisions only apply 'to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized groups or between such groups' (emphasis added). It follows that for a crime belonging to the second class to be perpetrated, an added requirement is envisaged, namely that the internal armed clash be 'protracted'. Allegedly the main reason for this distinction is that in the first class, there already existed a set of provisions laid down in Article 3 common to the four Geneva Conventions and that furthermore these provisions are held to have turned into customary international law. On the contrary, no previous treaty or customary rule existed regulating methods of combat in internal armed conflict. While making progress in this area, the majority of states gathered at the Rome Conference preferred to tread gingerly, so the explanation goes, so as to take due account of states' concerns. Assuming that this explanation is correct, the fact remains that a

dichotomy was created, which appears contrary to the fundamental object and purpose of international humanitarian law.

Furthermore, the prohibited use of weapons in internal armed conflicts is not regarded as a war crime. This regulation does not reflect the current status of general international law.

The above ICC Statute restrictions on modern regulation of armed conflict are compounded by two more factors: (i) allowance has been made for superior orders to relieve subordinates of their responsibility for the execution of orders involving the commission of war crimes (whereas under the ICC Statute for crimes against humanity or genocide superior orders a priori may not be pleaded); (ii) Article 124 allows states to declare, upon becoming parties to the Statute, that the Court's jurisdiction shall not become operative for a period of seven years with regard to war crimes (committed by their nationals or on their territory), whereas no similar allowance is made for other categories of international Crime.

One is therefore left with the impression that the framers of the ICC Statute were eager to shield their servicemen as much as possible from being brought to trial for war crimes.

To summarize, a tentative appraisal of the provisions on war crimes of the ICC Statute cannot but be changed: in many respects the Statute marks a great advance in ICL, in others it proves instead faulty; in particular, it is marred by being too obsequious to state sovereignty.

2.20.5 CRIMES AGAINST HUMANITY

THE NOTION

Under general international law the category of crimes against humanity is sweeping but sufficiently well defined. It covers actions that share a set of common features:

1. They are particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more persons.

2. They are not isolated or sporadic events, but are part of a widespread or systematic practice of atrocities that either forms part of a governmental policy or are tolerated, condoned, or acquiesced in by a government or a de facto authority. Clearly, it is required that a single crime be an instance of a repetition of similar crimes or be part of a string of such crimes (widespread practice), or that it be the manifestation of a policy or a plan of violence worked out, or inspired by, state authorities or by the leading officials of a de facto state-like organization, or of an organized political group (systematic practice). However, this contextual element does not necessarily mean that the individual act amounting to crime against humanity (murder, torture, rape, persecution, etc.) be repeated in time and space or, in other words that the same offence be committed on a large scale. It may also be sufficient for the offence at issue (murder, torture, persecution, etc.) to be part of a massive attack on the civilian population (see, however, *infra*, 5.6), whatever the form taken by such large-scale violence. This conclusion is warranted by the very rationale behind the prohibition and criminalization of this category of heinous conduct (international rules intend to proscribe and make punishable any offence against humanity, whatever its features, which is part of massive despicable violence against human beings, for they consider that such attacks, in whatever form, offend against humanity). It is also borne out by case law.

3. They are prohibited and may consequently be punished regardless of whether they are perpetrated in time of war or peace. While in 1945 a link with an armed conflict was required, at present customary law no longer attaches any importance to such nexus. Thus, while in 1945 the 'contextual element' of the

crime was the existence of an armed conflict, at present such element resides in a 'widespread or systematic' attack on the population.

4. The victims of the crime may be civilians or, where crimes are committed during armed conflict, persons who do not take part (or no longer take part) in armed hostilities, as well as, under customary international law (but not under the Statute of the ICTY, ICTR, and the ICC), enemy combatants.

Before embarking upon an exposition of the history of the notion and the various classes of crimes, it may be fitting to note that to a large extent many concepts underlying this category of crimes derive from, or overlap with, those of human rights law (the rights to life, not to be tortured, to liberty and security of the person, etc.), laid down in provisions of international human rights instruments (e.g. the Universal Declaration of Human Rights, the UN Covenant on Civil and Political Rights). Indeed, while ICL concerning war crimes largely derives from, or is closely linked with, IHL, ICL concerning crimes against humanity is to a great extent predicated upon international human rights law. IHL (which traditionally regulates warfare between or within states), and international human rights law (which regulates what states may do to their own citizens and, more generally, to individuals under their control), are in essence two distinct bodies of law, each arising from separate concerns and considerations. The former is largely rooted in notions of reciprocity—one need not be a great humanist to be in favour of laws of war for international conflicts, as it is simple self-interest for a state to ensure that its soldiers are treated well in exchange for treating enemy soldiers well and that its civilians are spared the horrors of war. The latter is more geared to community concerns, as it intends to protect human beings *per se* regardless of their national or other allegiance.

Let us now return to the large-scale or massive nature of the crimes. That this feature is a necessary ingredient of the crimes may be inferred from the first provisions setting out a list of such offences. They clearly, if implicitly, required that the offence, to constitute an attack on humanity, be of extreme gravity and

not be a sporadic event but part of a pattern of misconduct. Subsequent case law has consistently borne out that this is a major feature of the crimes.

The link or connection with a systematic policy of a government or a de facto authority was emphasized by the German Supreme Court in the British zone of occupation, in the numerous and significant decisions on crimes against humanity it delivered in the years 1948-52. By way of illustration, one can mention /. In 1950 the Court of Assizes of Hamburg summed up the case law in Veit Harlan.

However, when the atrocities are part of a government policy, the perpetrators need not identify themselves with this policy, as the District Court of Tel-Aviv held in 1951 in Enigster (a case concerning a Jew imprisoned in a Nazi concentration camp, who persecuted his fellow Jewish inmates). The Tel-Aviv Court rightly stated that a person who was himself persecuted and confined in the same camp as his victims can, from the legal point of view, be guilty of a crime against humanity if he performs inhumane acts against his fellow prisoners. In contrast to a war criminal, the perpetrator of a crime against humanity does not have to be a man who identified himself with the persecuting regime or its evil intention (542).

In summary, murder, extermination, torture, rape, political, racial, or religious persecution and other inhumane acts reach the threshold of crimes against humanity only if they are part of a practice.⁴ Isolated inhumane acts of this nature may constitute grave infringements of human rights or, depending on the circumstances, war crimes, but fall short of the stigma attaching to crimes against humanity. On the other hand, an individual maybe guilty of crimes against humanity even if he perpetrates one or two of the offences mentioned above, or engages in one such offence against only a few civilians, provided those offences are part of a consistent pattern of misbehavior by a number of persons linked to that offender (for example, because they engage in armed action on the same side, or because they are parties to a common plan, or for any other similar reason).

2.20.6 THE ORIGIN OF THE NOTION

The notion of crimes against humanity was propounded for the first time in 1915, on the occasion of mass killings of Armenians in the Ottoman Empire. On 28 May 1915 the French, British, and Russian Governments decided to react strongly. They therefore jointly issued a declaration stating that in law of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.

The expression 'crimes against humanity' was not in the original proposal emanating from the Russian Foreign Minister, Sazonov. He had suggested instead a protest against 'crimes against Christianity and civilization'. However, the French Foreign Minister Delcasse took issue with the reference to crimes against Christianity. He feared that the Muslim populations under French and British colonial domination might take umbrage at that expression, because it excluded them; consequently, they might feel discriminated against. Hence, he proposed, instead of 'crimes against Christianity', 'crimes against humanity'. This proposal was accepted by the Russian and British Foreign Ministers, and passed into the joint Declaration. It would seem that the three states were neither aware of, nor interested in, the general philosophical implications of the phrase they had used. Indeed, they did not ask themselves, nor did they try to establish in practice, whether by 'humanity' they meant 'all human beings' or rather 'the feelings of humanity shared by men and women of modern nations' or even 'the concept of humanity propounded by ancient and modern philosophy'. It is probable that, although they used strong language criminalizing the perpetrators of the massacre, in fact they were only intent on solving a short-term political problem, as is shown by the lack of any practical follow-up to their joint protest.

In any event, various initiatives to act diplomatically on behalf of humanity subsequently failed.

Similarly, the special Commission set up after the First World War proposed in its report to the Versailles Conference that an international criminal tribunal be created and that its jurisdiction extend to 'offences against the laws of humanity'. However, the 'Memorandum of Reservations' submitted by the two distinguished representatives of the United States, Robert Lansing and James Brown Scott, paralyzed any action by the Conference. They emphasized that while war crimes should be punished because 'the laws and customs of war are a standard certain' (at 64), the laws and principles of humanity are not certain, varying with time, place and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity' (at 73). This, the US delegates said, 'if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law' (at 64). As a result of the American opposition, no provision was made for crimes against humanity.

It is notable that in 1919 a few Extraordinary Courts Martial were established in the Ottoman Empire to try the presumed authors of the 1915-16 deportation, massacres and looting of Armenians. According to a distinguished author, at least 28 such Court Martial trials were held. Judging from the verdicts that are available, those courts tried in 1919-20 officials of the Ottoman Empire under the Ottoman Criminal Code,¹¹ and found many of them responsible for massacres, deportation, and looting,¹² or massacres 'for the purpose of destroying and annihilating Armenians.

During the Second World War, the Allies became aware that some of the most heinous acts of barbarity perpetrated by the Germans were not prohibited by traditional international law. The laws of warfare only proscribed violations involving the adversary or the enemy populations, whereas the Germans had also performed inhuman acts for political or racial reasons against their own citizens (Jews, trade union members, social democrats, communists, gypsies, members of the church), as well as other persons not covered by the laws of warfare.¹⁴ In addition, in 1945 persecution for political or racial purposes was not prohibited, even if perpetrated against civilians of occupied territories.

In 1945, at the strong insistence of the USA, the Allies thus decided that a better course of action than simply to execute all the major war criminals would be to bring them to trial. The London Agreement embodying the Charter of the International Military Tribunal (IMT) included a provision under which the Tribunal was to try and punish persons guilty, among other things, of 'crimes against humanity' (the use of this specific term was suggested by a leading scholar, Hersch Lauterpacht, to Robert Jackson, the US delegate to the London Conference, who was subsequently appointed chief US prosecutor at Nuremberg).¹⁵ These crimes were defined as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or connection with any crimes within the jurisdiction of the Tribunal [i.e. either 'crimes against peace' or 'war crimes'], whether or not in violation of the domestic law of the country where perpetrated.

One major shortcoming of this definition is that it closely linked crimes against humanity to the other two categories of offences. Article 6(c) indeed required, for crimes against humanity to come under the jurisdiction of the IMT, that they be perpetrated 'in execution of or in connection with' war crimes or crimes against peace. This link was not spelled out, but it was clear that it was only within the context of a war or of the unleashing of aggression that these crimes could be prosecuted and punished. As rightly pointed out by Schwelb, this association meant that only those criminal activities were punished which 'directly affected the interests of other States' (either because these activities were connected with a war of aggression or a conspiracy to wage such a war, or because they were bound up with war crimes, that is crimes against enemy combatants or enemy civilians). Plainly, in 1945 the Allies did not feel that they should legislate in such a way as to prohibit inhuman acts regardless of their consequences or implications for third states.

At that stage, what happened within a national system, even if contrary to fundamental values of humanity, was still of exclusive concern to that state if it

had no spill-over effects on other states: it fell within its own 'domestic jurisdiction',

Despite this limitation, the creation of the new category marked a great advance. First, it indicated that the international community was widening the category of acts considered of international concern. This category came to include all actions running contrary to those basic values that are, or should be, considered inherent in any human being (in the notion, humanity did not mean 'mankind' or 'human race' but 'the quality' of being humane).

Secondly, inasmuch as crimes against humanity were made punishable even if perpetrated in accordance with domestic laws, the 1945 Charter showed that in some special circumstances there were limits to the 'omnipotence of the State' (to quote the British Chief Prosecutor, Sir Hartley Shawcross) and that 'the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon his rights in a manner which outrages the conscience of mankind'.

A number of courts have explicitly or implicitly held by that Article 6(c) of the London Agreement simply crystallized or codified a nascent rule of general international law prohibiting crimes against humanity. It seems more correct to contend that that provision constituted new law. This explains both the limitations to which the new notion was subjected (and to which reference has already been made above) and the extreme caution and indeed reticence of the IMT in applying the notion.

The reticence and what could be viewed as the embarrassment of the IMT on the matter are striking. Six points, in particular, should be stressed.

First, the IMT tackled the issue of ex post facto law only with regard to crimes against peace (in particular, aggression), whereas it did not pronounce at all upon the no less delicate question of whether or not crimes against humanity constituted a new category of offence. (However, the reason for this omission

may also be found in the fact that the German defense counsel, in the joint motion of 19 November 1945 by which they complained about the retroactive application of criminal law by the IMT,¹⁸ only referred to crimes against peace; this probably occurred because they felt that such offences as murder, extermination, or persecution constituted breaches of the law in most countries of the world and in any case had been committed by Nazi authorities on a very large scale.)

Secondly, when dealing with *ex post facto* law, the IMT was rather reticent and indeed vague, as is apparent from, *inter alia*, the glaring discrepancy between the English and the French text of the judgment,¹⁹ both authoritative.

Thirdly, the IMT held that no evidence had been produced to the effect that crimes against humanity had been committed before the war, in execution of or in connection with German aggression.²⁰ The IMT thus markedly narrowed the scope, in case, of the category of crimes against humanity, although it asserted that it did so on grounds linked to the evidence produced.

Fourthly, probably aware of the novelty of that class of crimes and hence of the possible objection that the *nullum crimen* principle (see above, 2.3) was being breached by applying criminal law retroactively, the IMT tended to find that some defendants accused of various classes of crime were guilty both of war crimes and of crimes against humanity (this was the case with 14 defendants): in other words, the Tribunal avoided clearly identifying the distinction between the two classes, preferring instead to find that in many cases the defendant was answerable for both.

Fifthly, in the only two cases where the IMT found a defendant guilty exclusively of crimes against humanity (Streicher and von Schirach), the Tribunal did not specify the nature, content, and scope of the link between crimes against humanity and war crimes (in the case of Streicher) or crimes against humanity and aggression (in the case of von Schirach); rather, the Tribunal confined itself

to a generic reference to the connection between the classes of crimes, without any further elaboration.

Finally, it is striking that in the part of the judgment referring to Streicher, the English text is markedly different from the French.

In summary, in all probability the IMT applied new law, or substantially new law, when it found some defendants guilty of crimes against humanity alone or of these crimes in conjunction with others. However, this was not in breach of a general norm strictly prohibiting retroactive criminal law. As noted above (2.3), immediately after the Second World War, the *nullum crimen sine lege* principle could be regarded as a moral maxim destined to yield to superior exigencies whenever it would have been contrary to justice not to hold persons accountable for appalling atrocities. The strict legal prohibition of *ex post facto* law had not yet found expression in international law; nor did it constitute a general principle of law universally accepted by all states. The IMT set out the view that 'the maxim *nullum crimen sine lege* (...) is in general a principle of Justice' allowing the punishment of actions not proscribed by law at the time of their commission, when it would be 'unjust' for such wrongs to be 'allowed to go unpunished' (at 219).

In the wake of the major war trials, momentous changes in international law took place. On 11 December 1946 the UN GA unanimously adopted a resolution 'affirming' the principles of the Charter of the Nuremberg International Tribunal and its judgment. On 13 February 1946 it passed resolution 3(1) recommending the extradition and punishment of persons accused of the crimes provided for in the Nuremberg Charter. These resolutions show that the category of crimes against humanity was in the process of becoming part of customary international law.

In addition to the Charter of the Tokyo International Tribunal, a number of international instruments were then drawn up embodying the prohibition of crimes against humanity, some of which improved and expanded the provisions

of the London Agreement, for instance, the Peace Treaties with Italy, Romania, Hungary, Bulgaria, and Finland, each of which included terms providing for the punishment of these crimes.

In particular, after 1945 the link between crimes against humanity and war was gradually dropped. This is evidenced by Article II(I)(c) of such 'multinational' legislation as Control Council Law no. 10 passed by the four victorious Powers four months after the London Agreement; that is on 20 December 1945, by national legislation (such as the Canadian²⁵ and the French²⁶ criminal codes), case law,²⁷ as well as international treaties such as the 1948 Genocide Convention, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the 1973 Convention on Apartheid. This evolution gradually led to the abandonment of the nexus between crimes against humanity and war: at present, as stated above, customary international law bans crimes against humanity whether they are committed in time of war or peace. The same holds true for the ICC Statute, which confirms the rupture of the link between these crimes and armed conflict.

On the other hand, some treaties and other binding international instruments enshrining the Statutes of international courts and tribunals restrict the scope of customary rules. To be more accurate (because strictly speaking those Statutes do not lay down substantive rules of criminal law but only provide for the definition of those crimes over which each relevant court or tribunal is endowed with jurisdiction), such treaties and other instruments may indirectly contribute to the restriction of the customary rules. Thus, the Statutes of the ICTY (1993), the ICTR (1994), and the ICC (1998) provide that the crimes at issue can only be committed against civilians, whereas in some respects customary law upholds a broader notion of victims of such crimes (see *infra*, 5.6).

2.20.7 THE OBJECTIVE ELEMENTS

The conduct prohibited was loosely described in the London Agreement of 1945, and similarly in Control Council Law no. 10 and the Charter of the Tokyo

International Tribunal, as well the ICTY and the ICTR. Gradually case law has contributed to defining the legal contours of the *actus reus*. In the event, the various categories have been largely spelled out in the ICC Statute, Article 7, of which may be held to a large extent either to crystallize nascent notions or to codify the bulk of existing customary law (see *infra*, 5.7).

At present, ICL always requires for the crimes under discussion a general context of criminal conduct, consisting of a widespread or systematic practice of unlawful attacks against the population (see *supra*, 5.1, at 2; see, however, also the qualifications set out *infra* in 5.6).

If such context does exist, the following classes of offence constitute crimes against humanity:

1. Murder. As a rule, the mental element of this conduct is the intent to bring about the death of another person; intentional killing may or may not be premeditated, that is planned and willed in advance of the act of killing (with the mental status persisting over time between the first moment when the intention took shape and the later physical act of killing). However, for murder as a crime against humanity a lesser mental element is required by case law: it is sufficient for the perpetrator 'to cause the victim serious injury with reckless disregard for human life'.

2. Extermination-, that is mass or large-scale killing, as well as 'the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population' (Article 7(2)(b) of the ICC Statute).

The ICTR has defined the notion of extermination in a few cases³⁰ A Chamber of the ICTY offered a better definition in *Krstic*. It held that:

for the crime of extermination to be established, in addition to the general requirements for a crime against humanity, there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of numerically significant part of the population (§503).

The TC also specified that In accordance with the Tadic (AJ),' [...] it is unnecessary that the victims were discriminated against for political, social or religious grounds' (§499).³¹

It is submitted that one ought not to exclude from this class of crimes extermination carried out by groups of terrorists/or the purpose of spreading terror. (Of course, the necessary condition that the terrorist attack exterminating a group of persons be part of a widespread or systematic attack, must be fulfilled.) See also *infra*, 8.6.

3. Enslavement. This notion was gradually elaborated upon by case law, notably by two US Military Tribunals sitting at Nuremberg, in *Milch* (at 773-91) and in *Pohl and others* (at 970), and then refined by a TC of the ICTY in *Kunarac and others* (§§515-43). According to the ICC Statute, which crystallizes a nascent notion, enslavement 'means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children' (Article 7(2)(c)). The ICTY TC in *Kunarac and others* convincingly propounded a set of elements that clarify this definition (§§542-3). In addition, the TC set out clearly the reasons for which it found two of the defendants guilty of enslavement (§§728-82).

4. Deportation or forcible transfer of population', that is, the 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law' (Article 7(2)(d)).

An ICTY TC emphasized in *Krstic* that:

Both deportation and forcible transfer relate to involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacement within a State (§521).

In that case the TC found that, on 12-13 July 1995, about 25,000 Bosnian Muslim civilians were forcibly bussed outside the enclave of Srebrenica to the territory under Bosnian Muslim control, always within the same state (Bosnia and Herzegovina). The transfer was compulsory and was carried out 'in furtherance of a well organized policy whose purpose was to expel the Bosnian Muslim population from the enclave'. The Chamber concluded that the civilians transported from Srebrenica were not subjected to deportation but to forcible transfer, a crime against humanity (§§527-32).

5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law. An ICTY TC, in *Kordic and Cerkez*, was the first international court to offer a definition of this offence. It held that imprisonment as a crime against humanity must 'be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population' (§§302-3).

6. Torture-, that is 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused', except when pain or suffering is inherent in or incidental to lawful sanctions (Article 7(2)(e) of the ICC Statute).

In *Delalic and others* an ICTY TC noted that the definition of torture contained in the 1984 Torture Convention was broader than, and included, that laid down in the 1975 Declaration of the United Nations General Assembly and in the 1985 Inter- American Convention, and considered it to reflect a consensus which the TC regarded as 'representative of customary international law' (§459). Another TC of the ICTY, ruling in *Furundzija*, shared that conclusion, although on different legal grounds. It held that, as shown by the broad convergence of international instruments and inter- national jurisprudence, there was general acceptance of the main elements contained in the definition set out in Article I of the Torture Convention. It considered, however, that some specific elements pertained to

torture as considered from the specific view- point of ICL relating to armed conflicts. It held that torture as a crime committed in an armed conflict must contain the following elements: It (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition, (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non- private capacity, e.g. as a defacto organ of a State or any other authority-wielding entity.

The TC went on to note that:

As is apparent from this enumeration of criteria, the Trial Chamber considers that among the possible purposes of torture one must also include that of humiliating the victim. This proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity. The proposition is also supported by some general provisions of such important international treaties as the Geneva Conventions and Additional Protocols, which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from 'outrages upon personal dignity'. The notion of humiliation is, in any event close to the notion of intimidation, which is explicitly referred to in the Torture Conventions definition of torture (§162).

Subsequently, in Kunarac and others, another TC of the ICTY broadened that definition. Starting from the correct assumption that one ought to distinguish between the definition of torture under international human rights law and that applicable under ICL, the TC held, among other things, that 'the presence of a State official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under IHL' (§496). Another TC shared this view in Kvočka and others (§§137-41).

In *Brdanin* the ICTY AC made an interesting contribution to the delineation of the notion. The appellant had submitted that the TC had erred in law in its determination of what acts constitute torture; in his view torture, to amount to an international crime, must involve physical pain equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death. To support his contention, the appellant had stressed that this notion of torture was that recently propounded by the US Department of Justice in a legal memorandum. The AC dismissed the submission. After noting that 'no matter how powerful or influential a country is, its practice does not automatically become customary international law' (§247), the Chamber held that 'acts inflicting physical pain may amount to torture even when they do not cause pain of the type accompanying serious injury' (251).

Finally, in *Naletilic and Martinovic* the ICTY AC added an important specification, given the general purport of the definition of torture eventually set out 'in international case law. It clarified that the concrete and specific determination of whether an act causing severe mental or physical pain amounts to torture must be made on a case-by-case basis.

7. Sexual violence. This class of offence includes: (i) rape, a category of crime that was not defined in international law until a TC of the ICTR set out a rather terse definition in *Akayesu* (rape is 'a physical invasion of a sexual nature, committed under circumstances which are coercive', §597), taken up by a TC of the ICTY in *Delalic and others* (§479). Subsequently, two ICTY TCs delivered important judgments, in *Furundzija* and *Kunarac and others*³³ (ii) sexual slavery, (iii) enforced prostitution; (iv) forced pregnancy, namely 'the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law' (Article 7(2)(f) of the Rome Statute for an ICC) (perhaps this sub-category is not yet contemplated by customary international law: see *infra*, 5.7.3); (v) enforced sterilization; and (vi) any other form of sexual violence of comparable gravity.

8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds, that are universally recognized as impermissible grounds of discrimination under international law; persecution 'means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity' (Article 7(2)(g) of the Rome Statute for an ICC).'

An ICTY TC propounded an elaborate definition of this crime in Kupreskic and others (§§616-27). It found that the defendants were guilty of persecution, for: the "deliberate and systematic killing of Bosnian Muslim civilians" as well as their "organized detention and expulsion from Ahmici [the village where the crimes were committed]' can constitute persecution. This is because these acts qualify as murder, imprisonment, and deportation, which are explicitly mentioned in the Statute under Article 5 (§629).

The TC also found that the comprehensive destruction of Bosnian Muslim homes and property constituted 'a gross or blatant denial of fundamental human rights', and, being committed on discriminatory grounds, amounted to persecution (§§630-1).

9. Enforced disappearance of persons, namely 'the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time' (Article 7(2)(i) of the Rome Statute for an ICC). It may be noted that with respect to this crime the ICC Statute has not codified existing customary law but contributed to the crystallization of a nascent rule, evolved primarily out of treaty law (that is, the numerous treaties on human rights prohibiting various acts falling under this heading), as well as the case law of the Inter-American Commission and Court of Human Rights, in addition to a number of UN General Assembly resolutions. These various strands have been instrumental in the gradual formation of a customary rule prohibiting enforced

disappearance of persons. The ICC Statute has upheld and laid down in a written provision of the criminalization of this conduct.

10. Other inhumane acts of a similar character and gravity, intentionally causing great suffering, or serious injury to body or to mental or physical health. This notion harks back to Article 6(c) of the Nuremberg Statute, which simply criminalized 'other inhumane acts', by a provision lacking any precision and therefore at odds with the principle of specificity proper to criminal law (see above, 2.4.1).

The provision was subsequently interpreted in such cases as *Ternek*³⁵ on the strength of the *eiusdem generis* principle, thereby acquiring some degree of precision, as well as in *Kupresk'tc* and others, where an ICTY TC dwelt at length on the interpretation of the clause (§§563-6). The rule was recently restated in Article 7(l)(k) of the ICC Statute, which to a large extent codifies and in some respects develops customary international law.

In spite of its relatively loose character (which, however, has been rightly narrowed down by the case law, as just noted), the rule is important for it may function as a 'residual clause' covering and criminalizing instances of inhuman behaviour that do not neatly fall under any of the other existing categories of crimes against humanity (for instance, it can cover acts of terrorism not falling under the sub-category of murder, torture, etc; see *infra*,

Of course, the clause may serve this purpose only subject to strict conditions concerning the gravity of the inhuman conduct.

2.20.8 THE SUBJECTIVE ELEMENTS

The relevant rules of international law require two mental elements for the crimes under discussion- (i) the *mens rea* proper to the underlying offence (murder, rape, torture, deportation, etc.); and (ii) awareness of the existence of a widespread or systematic practice.

In most cases the first mental element is intent that is the intention to bring about a certain result. However, as noted above (5.3) in the case of murder, case law has considered that what is required for such conduct to amount to a crime against humanity is *inter alia* either the intent to kill, proper to murder, or a different intentional element, namely 'the intent to inflict serious injury in reckless disregard of human life'.

More generally, where an accused, acting as an 'agent of a system', does not directly and immediately cause the inhumane acts, it is not necessary that he anticipate all the specific consequences of his misconduct; it is sufficient for him to be aware of the risk that his action might bring about serious consequences for the victim, on account of the violence and arbitrariness of the system to which he delivers the victim.³⁶ Thus, recklessness (or *dolus eventualis*) maybe sufficient (see *supra* 3.7).

The second requirement is that the agent be cognizant of the link between his misconduct and a widespread or systematic practice (the 'contextual' practice may refer either to offences of the same category or to other large-scale attacks on the civilian population directed to offend the dignity and humanity of the population, as long as a link exists between the crime against humanity at issue and the practice). As the ICTY AC held in *Tadic* (AJ, 1999), the perpetrator needs to know that there is an attack on the civilian population and that his acts comprise part of the attack (§248); a TC held in *Blaskic* that the perpetrator needs at least to be aware of the risk that his act is part of the attack, and then takes that risk (TJ §§247, 251). This does not, however, entail that he needs to know the details of the attack (*Kunarac and others*, TJ §434). The rationale behind this requirement is clear: ICL intends to punish persons who, being aware of the fact that the crimes they are perpetrating (or plan to perpetrate) are part of a general framework of criminality, are thereby encouraged to misbehave and also hope subsequently to enjoy impunity (if this requirement is lacking, depending on the circumstances misconduct will amount to either a war crime or an ordinary criminal offence under domestic law).

When crimes against humanity take the form of persecution, another mental element also is required: a persecutory or discriminatory animus. The intent must be to subject a person or group to discrimination, ill-treatment, or harassment, so as to bring about great suffering or injury to that person or group on religious, political, or other such grounds. This added element for persecution amounts to a special criminal intent (*dol special*).

Finally, courts have not required, as part of the *mens rea*, that the perpetrator should have a specifically racist or inhuman frame of mind.

To sum up, the requisite subjective element or *mens rea* in crimes against humanity is not simply limited to the criminal intent (or recklessness) required for the underlying offence (murder, extermination, deportation, rape, torture, persecution, etc.).³⁸ The viciousness of these crimes goes far beyond the underlying offence, however wicked or despicable it may be. This additional element—which helps to distinguish crimes against humanity from war crimes—consists of awareness of the broader context into which this crime fits.

2.20.9 THE POSSIBLE AUTHORS

Normally it is state organs, i.e. individuals acting in an official capacity such as military commanders, servicemen, etc. who perpetrate crimes against humanity. Is this a necessary element of the crimes; that is, must the offence be perpetrated by organs or agents of a state or a governmental authority or on behalf of such bodies, or may such crimes be committed by individuals not acting in an official capacity? In the latter case, must the offence be approved or at least condoned or countenanced by a governmental body for it to amount to a crime against humanity?

The case law seems to indicate that the crimes we are discussing may be committed by individuals acting in their private capacity, provided they behave in unison, as it were, with a general state policy and find support for their misdeeds in such policy. This is clearly shown by the numerous cases brought after 1945 before the German Supreme Court in the British Occupied Zone and concerning denunciations to the German authorities of Jews or political opponents by private German individuals.

An interesting problem that may arise is whether crimes against humanity may be committed by state officials acting in a private capacity. It would seem that in such cases some sort of explicit or implicit approval or endorsement by state or governmental authorities is required, or else that it is necessary for the offence to be clearly encouraged by a general governmental policy, or at least to fit clearly within such a policy. This is best illustrated by the Weller case. This case, which seems to have been unknown until it was cited by the ICTY in Kupreskic (§555), gave rise to six different judgments by German courts after the Second World War.

2.20.10 THE POSSIBLE VICTIMS

Article 6(c) of the London Agreement establishing the IMT clearly prohibited two distinct categories of crimes: (i) inhumane acts such as murder, extermination, enslavement, and deportation of any civilian population, i.e. any group of civilians whatever their nationality; and (ii) persecution on political, racial, or religious grounds. Since the customary international law of crimes against humanity that has emerged is largely based on Article 6(c), it is fitting to look into the fundamental elements of that provision.

It is apparent from the wording of Article 6(c) that the *actus reus* is different for these two classes of crimes. Murder, extermination, and other 'inhumane acts' (of similar gravity) largely constitute offences already covered by all national legal systems, and also are committed against civilians. 'Persecutions', instead, embrace actions that at the time of their commission may not be prohibited by

national legal systems, for persecution may take the form of acts other than murder, extermination, enslavement, or deportation. Furthermore, since no mention is made of the possible victims of persecutions, or rather, as it is not specified that such persecutions should target 'any civilian population', the inference is warrantor that not only any civilian group but also members of the armed forces may be the victims of this class of crime.

For the purposes of our discussion, it is useful to deal separately with each of the two classes of crime against humanity.

2.20.11 'MURDER-TYPE' CRIMES AGAINST HUMANITY

'Murder-type' crimes against humanity embrace offences that are perpetrated 'against any civilian population'. The words 'any' and 'civilian' need careful interpretation. As for 'any', it is apparent, both from the text of the provision and from the legislative history of Article 6(c), that it was intended to cover civilians other than those associated with the enemy, who were already protected by the traditional rules of the law of warfare. In other words, by using 'any', the draftsmen intended to protect the civilian population of the state committing crimes against humanity, as well as civilians of its allied countries or of countries under its control, although formally under no military occupation.

As for the word 'civilian', it is apparent that it was intended to refer to persons other than lawful combatants, whether or not such persons were civilians fighting alongside enemy military forces. In other words, this phrase does not cover belligerents. The rationale for the relatively limited scope of this part of Article 6(c) is that enemy combatants were already protected by the traditional laws of warfare, while it was deemed unlikely that a belligerent might commit atrocities against its own servicemen or those of allied countries. In any event, such atrocities, if any, would come under the jurisdiction of the Courts Martial of the country concerned; in other words, they would fall within the scope of national legislation.

Nonetheless, after the Second World War courts gradually inclined towards placing a liberal interpretation on the term 'civilians'. For instance, the Supreme Court of Germany in the British Occupied Zone propounded a broad construction of Article 6(c). This court held in at least three cases that military persons could be the victims of crimes against humanity even in situations where the crime did not take the form of persecution. In other words, the court held that the crime at issue could be perpetrated against military personnel even if the offence was not one of those envisaged in the second part of Article 6(c) or in the corresponding second part of Article 11(l)(c) of Control Council Law no. 10. As a consequence, the court substantially broadened the notion of 'any civilian population' included in the first part of that provision. These three cases will be briefly summarized.

In a decision of 27 July 1948 in R., the court pronounced upon the guilt of a member of the Nazi Party and Nazi commandos (NSKK), who in 1944 had denounced a non-commissioned officer in uniform and member of the Nazi Party and the SA (assault units), for insulting the leadership of the Party. As a result of this denunciation, the victim had been brought to trial three times and eventually sentenced to death (the sentence had not been carried out because in the interim the Russians had occupied Germany). The court held that the denunciation could constitute a crime against humanity if it could be proved that the agent had intended to hand over the victim to the 'uncontrollable power structure of the [Nazi] party and State', knowing that as a consequence of his denunciation, the victim was likely to be caught up in an arbitrary and violent system (at 47).

In 1948, in P. and others the same court applied the notion of crimes against humanity to members of the military. In the night following Germany's partial capitulation (5 May 1945), four German marines had tried to escape from Denmark back to Germany. The next day they were caught by Danes and delivered to the German troops, who court-martialed and sentenced three of them to death for desertion; on the very day of the general capitulation of Germany (10 May 1945), the three were executed. The German Supreme Court found that the five members of the Court Martial were guilty of complicity in a

crime against humanity. According to the Supreme Court, the glaring discrepancy between the offence and the punishment proved that the execution of the three marines had constituted a clear manifestation of the Nazis' brutal and intimidatory justice, which denied the very essence of humanity in blind deference to the superior exigencies of the Nazi State. In this case as well, there had taken place 'an intolerable degradation of the victims to mere means for the pursuit of a goal, hence the depersonalization and reification of human beings' (at 220); consequently, by sentencing to death those marines, the members of the Court Martial had also injured humanity as a whole. With regard to the wording of the relevant provision on crimes against humanity (namely, Article II(l)(c) of Control Council Law no. 10, which referred only to offences 'against civilian populations'), the court observed the following:

Whoever notes the expressly emphasized illustrative character of the instances and classes of instance mentioned there, cannot come to the conclusion that action between soldiers may not constitute crimes against humanity. [Admittedly], a single and isolated excess would not constitute a crime against humanity pursuant to the legal notion of such crimes. [However], it has already been shown [in the judgment] that the action at issue can belong to the criminal system and criminal tendency of the Nazi era. For the offence to be a crime against humanity, it is not necessary that the action should support or sustain Nazi tyranny, or that the accused should intend so to act (at 228).

Finally, in its decision of 18 October 1949 in H., the court dealt with a case in which a German judge had presided over two trials by a Naval Court Martial against two officers of the German Navy: one against a commander of submarines who had been accused of criticizing Hitler in 1944, the other against a lieutenant-commander of the German naval forces, charged with procuring two foreign identity cards for himself and his wife in 1944. The judge had initially sentenced both officers to death (the first had been executed, while the sentence against the second had been commuted by Hitler to ten years' imprisonment). The Supreme Court held that the judge could be held guilty of crimes against

humanity to the extent that his action was undertaken deliberately in connection with the Nazi system of violence and terror (at 233-4,238, 241-4).

After the Second World War other courts, with the notable exception of the French Court of Cassation in *Burbie*,⁴² tended instead to place a strict interpretation on the term 'civilians' and consequently to rule out from the notion of victims of crimes against humanity persons who belonged, or had belonged, to the military. Indicative in this respect is *Neddermeier*, brought before a British Court of Appeal established under Control Council Law no. 10.⁴³

The trend towards loosening the strict requirement that the victims be civilians also continued, however, in more recent times. It is significant that the ICTY has placed a liberal interpretation on the narrow notion of victims of crimes against humanity set out in Article 5 of its Statute (according to which those crimes can only be committed against 'any civilian population'). In its decision in *Mrksic and others* (rendered under Rule 61 of the Rules of Procedure and Evidence), the court held that crimes against humanity could be committed even where the victims at one time bore arms.

A different issue that arose in cases brought before the United States Military Tribunals sitting at Nuremberg is whether victims of extermination through euthanasia as a crime against humanity may be nationals of the state concerned, or whether such victims must perforce be foreigners. In these cases some defendants had been accused of participating in euthanasia programmes for the chronically disabled or terminally ill. The Tribunals wrongly held that euthanasia amounted to a crime against humanity only if carried out against foreigners, i.e. non-nationals of the state practicing euthanasia.

2.20.12 'PERSECUTION-TYPE' CRIMES AGAINST HUMANITY

As stated above, it is apparent from Article 6(c) that in the case of persecution, the victims of crimes against humanity need not necessarily be civilians; they may also include military personnel. There is an obvious rationale for this

regulation: traditional laws of warfare, while they protected servicemen against such illegal actions by the enemy as treachery and use of prohibited means or methods of warfare, did not safeguard them against persecution either by the enemy, or by the Allies or by the very authorities to which military personnel belonged.

The textual and logical construction of Article 6(c) was confirmed implicitly in Pilz by the Dutch Special Court of Cassation and explicitly by French courts in Barbie and Touvier.

2.20.13 THE GRADUAL BROADENING OF THE CATEGORY OF VICTIMS

As a result of the gradual disappearance in customary international law of the nexus between crimes against humanity and armed conflict, so too has the emphasis on civilians as the exclusive class of victims of such crimes dwindled, if not disappeared. For if crimes against humanity may be committed in time of peace as well, it no longer makes sense to require that such crimes be perpetrated against civilians alone. Why should members of military forces be excluded, since they in any case would not be protected by IHL in the absence of any armed conflict? Plainly, in times of peace military personnel too may become the object of crimes against humanity at the hands of their own authorities. By the same token, in time of armed hostilities, there is no longer any reason for excluding servicemen, whether or not hors de combat (wounded, sick, or prisoners of war), from protection against crimes against humanity (chiefly persecution), whether committed by their own authorities, by allied forces, or by the enemy.

The broadening of the category of persons safeguarded by the relevant rules of customary international law is consonant with the overall trend in IHL toward expanding the scope of protection of the basic values of human dignity, regardless of the legal status of those entitled to such protection. This trend has manifested itself in, inter alia, the adoption of international treaties protecting human rights and treaties prohibiting crimes such as genocide, apartheid, or

torture, in the passing of some significant resolutions by the United Nations General Assembly, and in certain pronouncements of the International Court of Justice. Nowadays, international human rights standards also clearly protect individuals against abuses and misdeeds of their own governmental authorities. It follows that there no longer exists any substantial reason for refusing to apply the notion of crimes against humanity to vicious and inhumane actions undertaken on a large scale by governments against the human dignity of their own military or the military personnel of allies or other non-enemy countries (or even of the enemy). It is worth noting that, had this expansion of the notion of crimes against humanity not occurred, a strict interpretation of the notion of civilians would lead in times of armed conflict to a questionable result. Some categories of combatants who, in modern armed conflicts (particularly in internal conflicts) often find themselves in a twilight area, would remain unprotected—or scantily protected—against serious atrocities. Consider, for example, members of paramilitary forces or members of police forces who occasionally or sporadically take part in hostilities. These are persons whose legal status may be uncertain, as one may not be sure whether they are to be regarded as combatants or civilians.⁴⁷ It could therefore follow that, under a strict and traditional interpretation of the crimes at issue, and assuming that these persons were at the same time regarded as combatants, they would ultimately be unprotected by the prohibition against such crimes.

By way of conclusion on this point, the proposition is warranted that the scope of the customary rules on crimes against humanity is much broader than normally admitted. Private individuals may also perpetrate those crimes (provided the governmental authorities approve of or condone, or at any rate fail to repress their action, or their action fits into a widespread or systematic practice of official misconduct). Furthermore, the victims of the crimes belonging to the subclass of persecutory offences, as well as—it is here contended—those of the other subclass, may embrace both civilians and combatants. In addition, such victims need not have the nationality of an enemy country but may belong to the country whose authorities order, approve, fail to punish, or condone the pattern of misbehaviour amounting to crimes against humanity.

2.20.14 CUSTOMARY INTERNATIONAL LAW AND ARTICLE 7 OF THE ICC STATUTE

Let us now ask ourselves whether Article 7 of the ICC Statute, contemplating crimes against humanity as one of the categories of criminal conduct over which the Court has jurisdiction, departs from or instead restates customary international law.

A comparison between customary international law and the ICC Statute shows that by and large the latter is based on the former. However, many differences may be discerned. In some respects, Article 7 elaborates upon and clarifies, in other respects it is narrower than, customary international law; in others, it instead broadens customary rules.

2.20.15 AREAS WHERE ARTICLE 7 SETS FORTH ELEMENTS OF CUSTOMARY INTERNATIONAL LAW

Article 7 specifies and elaborates upon customary international law in many respects. First, it specifies that a crime against humanity must be committed 'with knowledge of the attack'. The provision thus makes it clear that the requisite mens rea must include the awareness that the individual criminal act is part of a widespread or systematic attack on a civilian population.

Secondly, Article 7 clarifies the objective elements of some of the underlying offences, by making explicit notions that, until set out in this Article, were only implicit and could therefore be determined only by way of interpretation. These notions are further elaborated upon in the 'Elements of Crimes' adopted by the Preparatory Commission.

Finally, one should emphasize that the 'Elements of Crime' have clarified an important aspect of mens rea. In commenting on the need for the offender to have knowledge of a widespread or systematic attack on a civilian population, it is stated there that:

However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the state or organization. In the case of an emerging widespread or systematic attack on a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such attack.

2.20.16 AREAS WHERE ARTICLE 7 IS NARROWER THAN CUSTOMARY INTERNATIONAL LAW

On some points, Article 7 departs from customary law by setting out notions at odds with that body of law.

First, Article 7(1) defines the victim or target of crimes against humanity as 'any civilian population'. This provision, which thus adopts a position similar to that taken in the statutes of the ICTY (Article 5) and the ICTR (Article 6), excludes non-civilians (i.e. the military) from the victims of the crimes under discussion. Thus, any of the acts enumerated in Article 7(l)(c) to (k), if perpetrated against an enemy combatant, would only amount to a war crime or a grave breach of the 1949 Geneva Conventions. The question arises whether the term 'civilian population' includes belligerents hors de combat who have laid down their weapons, either because they are wounded or because they have been captured. As we have seen above, the case law of the ICTY has answered this question in the affirmative. It would seem to be consonant with the humanitarian object and purpose of Article 7 to suggest the same solution with regard to this provision.

Secondly, Article 7, in defining 'attack directed against any civilian population' narrows the scope of the notion of 'widespread or systematic practice' required as a context of a specific offence, for the offence to amount to a crime against humanity. Indeed, in paragraph 2(a) that provision stipulates that 'attack' means 'a course of conduct involving the multiple commission of acts referred to in

paragraph I against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'. It would seem that the Statute requires that the offender, in committing a crime against humanity, pursue or promote such a practice. It would follow that any practice simply tolerated or condoned by a state or an organization would not constitute an attack on the civilian population or a widespread or systematic practice. For instance, in the case of murder, or rape, or forced pregnancy, why should it be required that the general practice constitute a policy pursued by a state or an organization? Would it not be sufficient for the practice to be accepted, or tolerated, or acquiesced in by the state or the organization, for those offences to constitute crimes against humanity?

Clearly, this requirement goes beyond what is required under international customary law and unduly restricts the notion under discussion. The 'Elements of Crime' make this restriction even broader and more explicit. There it is stated that 'the policy to commit such attack' 'requires that the State or organization actively promote or encourage such an attack against a civilian population' (emphasis added).

Thirdly, Article 7 is less liberal than customary international law with regard to one element of the definition of persecution. Under Article 7(l)(h), persecution, in order to fall under the jurisdiction of the ICC, must be perpetrated 'in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court'. Instead, under customary international law no such link is required. In other words, it is not necessary for persecution to consist of (a) conduct defined as a war crime or a crime against humanity or linked to any such crime; plus (b) a discriminatory intent. Under general international law, persecution may also consist of acts not punishable as war crimes or crimes against humanity, as long as such acts (a) result in egregious violations of fundamental human rights; (b) are part of a widespread or systematic practice; and (c) are committed with a discriminatory intent. Article 7(1) (h) imposes a further burden on the Prosecution: it must be proved that, in addition to discriminatory acts based on one of the grounds described in this provision, the *actus reus* consists of one of

the acts prohibited in Article 7(1) or of a war crime or genocide (or aggression, if this crime is eventually accepted as falling under the jurisdiction of the Court), or must be 'connected' with such acts or crimes. Besides adding a requirement not provided for in general international law. Article 7 uses the phrase 'in connection with', which is unclear and susceptible to many interpretations.

2.20.17 AREAS WHERE ARTICLE 7 IS BROADER THAN CUSTOMARY INTERNATIONAL LAW

Article 7 expands general international law in at least two respects.

First, it broadens the classes of conduct amounting to crimes against humanity. Thus, it includes within this category 'forced pregnancy' (Article 7(l)(g) and (2)(f))> (see supra, 5.3, sub 7); 'enforced disappearance of persons' (Article 7(l)(i) and (2)(i)); and 'the crime of apartheid' (Article 7(l)(j) and (2)(h)) (as noted supra at 5.3 sub 9, the ICC Statute has, however, contributed to the recent formation of a customary rule on the matter).

Secondly, in dealing with the crime of persecution, it greatly expands the category of discriminatory grounds. While under customary international law these grounds may be political, racial, ethnic, or religious, Article 7(l)(h) adds 'cultural' grounds, 'gender as defined in paragraph 3 [of the same provision]', as well as 'other grounds that are universally recognized as impermissible under international law'.

2.20.18 GENOCIDE

THE NOTION

Genocide is the intentional destruction, through one of five well-specified categories of conduct, of one of some groups as such (national, ethnical, racial, or religious) or of members of one of these groups as such.

Article 6(c) of the Charter of the IMT did not envisage genocide as a crime falling under the Tribunals jurisdiction. However, in referring to crimes against humanity

it used a wording ('murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population' and 'persecutions on political, racial or religious grounds') that encompassed large-scale massacres of ethnic, racial or religious groups. In dealing with the extermination of laws and other ethnic or religious groups, the IMT referred in its judgment to the crime of persecution (Goring and others, at 247-55).

The extermination of Jews as a crime against humanity was discussed in a few other cases: Hoess, decided by a Polish court in 1947 (at 12-18), and Greifelt and others, heard in 1948 by a US Military Tribunal (at 2-36). In the latter judgment (and in Altstotter and others, at 1128, 1156), the word 'genocide' was used to describe the criminal conduct, without however elevating genocide to a distinct category of criminality. In other cases (for instance, Kramer and others (the Belsen trial), at 4, 117-21; and see 106) the killing of Jews in concentration camps was dealt with as a war crime.

Thus, at this stage prosecution and punishment of massacres of ethnic or religious groups did not require evidence of the 'special intent' typical of genocide (see *infra*, 6.5), but simply proof of the subjective and objective elements of either crimes against humanity or war crimes.

2.20.19 THE 1948 CONVENTION ON GENOCIDE

Genocide acquired autonomous significance as a specific crime in 1948, when the UN GA adopted the Genocide Convention.

2.20.20 MAIN FEATURES OF THE CONVENTION

A careful look at the Convention shows that it pursued two goals: (i) to oblige Contracting Parties to criminalize genocide and punish their authors within the legal system of each Party, and accordingly (ii) to provide for the judicial cooperation of those contracting states for the suppression of the crime. This is already made clear by the preamble, where the draughtsmen, after declaring that

genocide is a crime under international law, set out their conviction that 'in order to liberate mankind from such an odious scourge, international co-operation is required'.¹ The various provisions of the Convention bear out that this is its main purpose. In Article I it is stipulated that the Contracting Parties 'undertake to prevent and punish' genocide. Article III imposes upon Contracting Parties the obligation to punish not only the perpetration of genocide but also conduct somehow linked to the crime, which the provision defines by using criminal law categories: conspiracy, incitement, attempt, and complicity. By Article IV states assume the obligation to punish persons committing genocide or related conduct even if they are 'constitutionally responsible rulers' or 'public officials'. Article V provides for the enactment of the necessary criminal legislation, with particular regard to penalties. Article VI deals with criminal jurisdiction over the offence, and Article VII addresses the issue of extradition.

It thus seems clear, both from the text of the Convention and the preparatory works² that the Genocide Convention is very much like some previous international treaties such as the 1926 Convention on Slavery (followed by the Protocol of 1953), the 1929 International Convention for the Suppression of Counterfeiting Currency, or the more recent UN Convention Against Torture of 1984, which (i) provide for a set of international obligations that contracting states are required to implement within their own domestic legal systems, and in addition (ii) arrange for judicial cooperation in the matter regulated by the treaty.

It was perhaps the naive assumption of the Convention's draughtsmen that, after the horrendous genocide of European Jews in the Second World War and the stiff punishment of many of its planners and perpetrators at the hands of criminal courts, contracting states themselves would not dare to engage in genocide. Plausibly it is this assumption that to some extent accounts for the odd (or, rather, ingenuous) provision in Article VI stipulating that persons accused of genocide must be prosecuted and tried by the judicial authorities of the territory in which 'the act was committed' (plus a future international criminal court that in 1948 looked like a radiant daydream).

2.20.21 THE DUAL REGIME OF RESPONSIBILITY FOR GENOCIDE, ACCORDING TO THE ICJ

In the judgement delivered on 26 February 2007 in the *Bosnia v. Serbia* case, the International Court of Justice (ICJ) chose to place an expansive interpretation on the Convention. It preferred to look upon it as a treaty that also imposes on contracting states as such, that is as international subjects, specific obligations relating to their own behaviour towards groups protected under Article II (1) (national, ethnical, racial, or religious groups). This led the Court to propound the notion that the Convention upholds 'a duality of responsibility' for genocide: according to the Court the same acts may give rise both to individual criminal liability and state responsibility (§§163 and 173).

The Court first of all construed Article I as imposing not only a duty to prevent and punish genocide, but also an obligation for contracting states to refrain from engaging in genocide (§§162-6). This interpretation, as the Court rightly noted, is fully warranted having regard to the object and purpose of the Convention. It broadens the scope of Article I and also makes the set of obligations it is designed to impose more consistent: it would be 'paradoxical' for states to be obliged to prevent and punish genocide, while being free themselves to engage in genocide.⁴ The interpretation 'is also supported by the purely humanitarian and civilizing purpose of the Convention'. I would add that this obligation, as set out by the Court, does not remain unchecked:

It is the ICJ that can ensure the judicial safeguard of compliance with such obligation, pursuant to Article IX of the Convention. However, the Court did not stop here. It interpreted Article III as implying that contracting states are also under the obligation to refrain from engaging in any of the sets of conduct envisaged in that provision: conspiracy, direct and public incitement, attempt to commit genocide, or complicity in genocide.

Thus the Court ended up contemplating the same prohibited conduct both with regard to individuals and with respect to states. Both individuals and states may

incur, respectively, criminal liability and state responsibility for the same unlawful behaviour (acts of genocide, conspiracy, incitement, attempt, or complicity). This view has been criticized by a number of commentators⁷ According to a more convincing view the Convention (and the customary rules evolved as a result of its broad acceptance by states and the passing of national legislation along the same lines) chiefly provides for criminal liability of individuals for any of the acts of genocide enumerated in Article III of the Convention (and in addition imposes on contracting states only the obligation to prevent and repress genocide by individuals, be they state officials or private individuals). As for state responsibility for genocide, it arises in the event of a breach of the customary rule of international law obliging states to refrain from engaging in genocide as a conduct involving a genocidal policy pursued or tolerated by the state. Thus, as has been rightly noted, the subjective and objective conditions on which the arising of, respectively, state and individual responsibility for genocide is contingent, may and indeed do differ.

2.20.22 MAIN MERITS OF THE CONVENTION

The Convention has numerous merits. Among other things, (i) it sets out a careful definition of the crime; (ii) it punishes other acts connected with genocide (conspiracy, complicity, etc.); (iii) it prohibits genocide regardless of whether it is perpetrated in time of war or peace; (iv) thanks to the Convention and its very broad acceptance by states, at the level of state responsibility it is now widely recognized that customary rules on genocide impose *erga omnes* obligations; that is, lay down obligations towards all other member states of the international community, and at the same time confer on any state the right to require that acts of genocide be discontinued. Furthermore, those rules now form part of *jus cogens* or the body of peremptory norms; that is, they may not be derogated from by international agreement (nor *a fortiori* by national legislation).

One should, however, be mindful of the flaws or omissions of the Convention. These are the most blatant ones:

1. The definition of genocide does not embrace cultural genocide (that is, the destruction of the language and culture of a group). Probably it was felt that cultural genocide is a rather nebulous concept. Similarly, genocide does not encompass the extermination of a group on political grounds. This was a deliberate omission. One may wonder whether the elimination of political groups fits with the notion of genocide. Killing all the communists in a country is extermination, but is it genocide? Many would think not. The Convention confined itself to the physical destruction of relatively stable groups to which persons in most instances belong 'involuntarily' and, often, by birth (clearly, in the case of religious groups, membership may be voluntary).

2. The four classes of protected groups (national, ethnical, racial, and religious) are not defined, nor are criteria for their definition provided.

3. The enforcement mechanism envisaged in the Convention is ineffective (in Article IV the Convention contemplates trials before the courts of the state on the territory of which genocide has occurred, or before a future 'international penal tribunal'. This is a flaw because it is the territorial state authorities (or persons supported by such authorities) that normally tend to commit acts of genocide; so national prosecutors will be reluctant to bring prosecutions; furthermore, no international penal tribunal existed at the time, nor for 50 years afterwards. Moreover, Article VIII provides that any contracting party 'may call upon the competent organs of the United Nations to take such action' under the Charter 'as they consider appropriate' for the prevention or suppression 'of genocide, whereas Article IX confers on the ICJ jurisdiction over disputes between states concerning the interpretation, application, or fulfillment of the Convention.

Indeed, at the enforcement level the Convention has long proved a failure.

Only once did a United Nations body pronounce on a specific instance of massacres, that it defined as genocide: this occurred in the case of Sabra and Shatila, when the UN GA characterized the mass killing of Palestinians perpetrated there by Christian falangist troops as 'an act of genocide' in its

resolution 37/123 Dofl6 December 1982. (However, the GA did not set out the legal reasons for this 'finding', nor did it draw any legal consequences from it.) Subsequently in 1993, for the first time a state brought a case of genocide before the ICJ: *Bosnia v. Serbia*. In 1999 Croatia also instituted before the ICJ proceedings against Serbia for violations of the Genocide Convention.

2.20.23 DEVELOPMENTS IN THE CASE LAW ON GENOCIDE

If we leave aside a few decisions handed down by the Extraordinary Courts Martial of the Ottoman Empire in 1920 and dealing with 'the massacres of Armenians carried out with the goal of annihilating them'¹¹ (at that time the notion of genocide had not yet been fully developed), it is striking that, until the 1990s, only a few cases of genocide were brought before national courts. Chief among them is *Eichmann* (decided in 1961 by the District Court of Jerusalem and subsequently, in 1962, by the Israeli Supreme Court). *Eichmann* was tried for 'crimes against the Jewish people', an offence under Israeli law which incorporated all the elements of the definition of genocide (and the Supreme Court of Israel held that 'the crimes against the Jewish People' corresponded to genocide, *Eichmann*, SC, at 287).

By contrast, much headway has been made both at the level of prosecution and punishment of genocide by international criminal tribunals (which have prodded national courts also to deal with this crime) and at the normative level.

Genocide as a crime of individuals began to be punished following the establishment of the ICTY and the ICTR. Genocide having been provided for in the Statutes of both Tribunals as well as the ICC (followed by provisions relating to the Special Panels for East Timor and the Extraordinary Chambers for Cambodia),¹² the first two courts have had the opportunity to try quite a few persons accused of this crime. They have delivered important judgments on the matter: the ICTR, particularly in *Akayesu* (§§204-28) and *Kayishema and Ruzindana* (§§41-9); the ICTY in *felisic* (§§78-83) and *Krstic* (§§539-69).

After the establishment of the ICTY and the ICTR, some national courts began to institute criminal proceedings against persons accused of serious crimes in the former Yugoslavia. German courts have thus pronounced on some cases of genocide.¹³ Trials on genocide have also been conducted in other countries (for instance, in Ethiopia, where the High Court tried former President Mengistu in absentia; see Mengistu and other's).

At the norm-setting level, some major advances stand out. The major substantive provisions of the Convention gradually turned into customary international law. In its Advisory Opinion on Reservations to the Convention on Genocide, the ICJ held that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation' (at 24). This view was confirmed by the Court in *Bosnia v. Serbia* (§§161). It is notable that the UN SG took the view of the customary status of the Genocide Convention (or, more accurately, of the substantive principles it lays down), a view that was endorsed implicitly by the L'N' SC,¹⁴ and explicitly by the ICTR in *Akayesu* (§495) and by the ICTY in *Krstic* (§541).

2.20.24 THE OBJECTIVE ELEMENTS

Article II of the Genocide Convention, and the corresponding rule of customary law, clearly defines the conduct that may amount to genocide:

- (i) killing members (hence more than one member) of what we could term a 'protected group', namely a national or ethnical, racial, or religious group;
- (ii) causing serious bodily or mental harm to members of a 'protected group';
- (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) imposing measures intended to prevent birth within the group; or.
- (v) forcibly transferring children of the group to another group.

While the definition of the four classes of group is an intricate problem that requires serious interpretative efforts (see *infra*, 6.6.1), the various classes of action falling under genocide seem to be relatively clear. They were to a large extent spelled out in *Akayesu* (TJ), as well as other judgments of the ICTR:

(i) as for killing members of the group, 'killing' must be interpreted as 'murder', i.e. voluntary or intentional killing;

(ii) as for causing serious bodily or mental harm, these terms 'do not necessarily mean that the harm is permanent and irremediable': *Akayesu* §§502-4; *Gacumbitsi*, D, §291. As an ICTY TC put it in *Krstic*: In line with the *Akayesu* Judgement [§502], the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury (§513).

See also ICTY, *Blagojevic and Jokic*, TJ, §645. The harm may include acts of bodily or mental torture, sexual violence, and persecution (*Rutaganda*, TJ, §51).

(iii) with regard to deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in *Akayesu* the TC held that this expression includes among other things, 'subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement[s]': (§§505-6), or the 'deliberate deprivation of resources indispensable for survival, such as food or medical services' (*Kayishema and Ruzindana*, §115); according to an ICTY TC in *Brdanin*, 'also included is the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion' (§691).

(iv) as for 'imposing measures intended to prevent births within the group', in *Akayesu* it was held that these measures could consist of 'sexual mutilation, the practice of sterilization, forced birth control [and the] separation of the sexes and prohibition of marriage's' (§507); in addition, the measures at issue may be not only physical but also mental (§508); they may include rape as an act directed to prevent births when the woman raped refuses subsequently to procreate (§508); see also *Rutaganda*, TJ, §53 and *Musema*, TJ, § 158.

(v) forcibly transferring children of the group to another group may embrace threats or intimidation leading to the forcible transfer of children to another group (*Akayesu*, §509).

Another interesting problem relating to *actus reus* is whether genocide may also include the killing, with the required intent, of only one single member of a protected group. In *Akayesu* the Trial Chamber, when dealing with the constituent elements of genocide, held the view that there may be genocide even if one of the acts prohibited by the relevant rules on this matter is committed 'against one' member of a group (§521). Arguably, this broad interpretation is not consistent with the text of the norms on genocide, which speak instead of 'members of a group' (see above).

It would seem that Article II does not cover the conduct currently termed in non-technical language 'ethnic cleansing'; that is the forcible expulsion of civilians belonging to a particular group from an area, a village, or a town. (In the course of the drafting of the Genocide Convention, Syria proposed an amendment designed to add a sixth class of acts of genocide: Imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment'. However, the draughtsmen rejected this proposal.)

Some courts have indeed excluded the forced expulsion of persons belonging to a particular ethnic, racial, or religious group from the notion of genocide.¹⁷ However, in other cases courts have asserted that that expulsion, under certain

circumstances, could be held to amount to genocide.¹⁸ Probably the better view is that upheld by the German Constitutional Court in *Jorgic*, namely that 'systematic expulsion can be a method of destruction and therefore an indication, though not the sole substantiation, of an intention to destroy' (at §24). (A similar view was propounded by an ICTYTC in *Krstic* (at §§589-98).)

In *Krstic* an ICTY TC clarified the *actus reus* by defining the notion of the destruction of a group 'in part'. The Prosecution had accused the defendant of genocide for having planned and participated in the massacre in a limited locality (the area of Srebrenica), of between 7,000 and 8,000 Bosnian Muslims, all of them men of military age. The question arose of whether the 'protected group' was constituted by the 'Bosnian Muslims of Srebrenica' or instead by 'Bosnian Muslims'. The Chamber answered the query by noting that the group was that of Bosnian Muslims, and the Bosnian Muslims of Srebrenica constituted 'a part of the protected group' under Article 4 of the ICTY Statute (§560) (which was based on Article II of the Genocide Convention and was held by the Chamber to be declaratory of customary international law: §§541-80). The Chamber added that 'the intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality' could be characterized as genocide (§589).¹⁹ As for the fact that the persons systematically killed at Srebrenica were 'only men of military age', the TC emphasized that, while these men were being massacred, at the same time the rest of the Bosnian Muslim population was being forcibly transferred out of the area.

The Chamber concluded that the killing of all the Bosnian Muslim men of military age in Srebrenica accompanied by the intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 of the ICTY Statute must qualify as genocide.

Before making this ruling, the TC had also discussed the question of the extent to which, while appraising whether or not genocide had been perpetrated in the case at issue, it could take into account evidence or facts relating to the cultural

or social destruction of a group, as opposed to its physical or biological destruction.

2.20.25 THE SUBJECTIVE ELEMENTS

The mental requirement for genocide as a crime involving international criminal liability is provided for in Article 11(1) of the Convention on Genocide (and in the corresponding customary rule): the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. Genocide is a typical crime based on the 'depersonalization of the victim'; that is a crime where the victim is not targeted on account of his or her individual qualities or characteristics, but only because he or she is a member of a group. As the German Federal Court of Justice rightly held in Jorgic in 1999, the perpetrators of genocide do not target a person 'in his capacity as an individual'; they 'do not see the victim as a human being but only as a member of the persecuted group'

This intent amounts to *dolus specialis*-, that is, to an aggravated criminal intention, required in addition to the criminal intent accompanying the underlying offence (killing; causing serious bodily or mental harm; inflicting conditions of life calculated to physically destroy the group; imposing measures designed to prevent births within the group; forcibly transferring children). It logically follows that other categories of mental element are excluded: recklessness (or *dolus eventualis*) and gross negligence.

The ICTR TCs have contributed greatly to elucidating the subjective element of genocide. In *Akayesu*, an ICTR TC held that the commission of genocide required 'a special intent or *dolus specialis*'. 'Special intent' is defined by the ICTR as 'the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged' (§498). The TC added that intent 'is a mental factor which is difficult, even impossible to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact' (§523). It added that one can in particular infer the special

intent 'from all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators'.

2.20.26 PROBLEMATICAL ASPECTS OF GENOCIDE

There are three issues concerning genocide that are at the same time intricate and controversial, and which therefore deserve our attention: (i) how to identify the various 'protected' groups; (ii) whether acts of genocide always require an underlying genocidal policy by a state or organized authority; (iii) how to discern genocidal intent.

2.20.27 HOW TO IDENTIFY THE 'PROTECTED' GROUPS

The major problems concerning the objective element of genocide relate to the notion of the group victim of the crime as well as the identification of the four groups enumerated in the rule (national, ethnical, racial, and religious). The former problem may be termed as follows: what do the Convention and the corresponding customary rule mean by 'group'? In other words, when can one state with certainty that one is faced with a group protected by the Convention? The latter question, which is obviously closely related to the former, is 'By what standards or criteria can one identify each of the four groups?' Can one rely upon an objective test for each group? If so, where does one find such a test?

Normally the various classes of groups are defined objectively, on account of some alleged objective features each group exhibits. By national group is meant a multitude of persons distinguished by their nationality or national origin (for instance, the French citizens living abroad in a particular country, the US nationals of Irish descent). Race is a notion whose scientific validity has been debunked by anthropologists: it must nevertheless be perforce interpreted and applied when used in a legal provision. In the Genocide Convention race seems to embrace groups that share some hereditary physical traits or features, such as the colour of skin. Ethnicity refers to groups that share a language and cultural

traditions. Religion is probably the least controversial standard; it refers to groups sharing the same religion or set of spiritual beliefs and faith, as well as modes of worship.

The case law of the ICTR and ICTY has contributed considerably to clarifying the notion of 'group', moving from an objective to a subjective evaluation. The importance of Akayesu in particular needs to be stressed. In this case, an ICTR TC not only emphasized that genocide is the most grave international crime or, as it put it, 'the crime of crimes' (§16), but also, and more importantly, set out a definition of 'group'. In its view, this word, in the provisions on genocide, refers only to 'stable groups constituted in a permanent fashion, and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner (§511).

According to the TC, the groups protected against genocide should not be limited to the four groups envisaged in the relevant rules, but—in order to respect the intention of the draughtsmen of the Genocide Convention, who clearly intended to protect any identifiable group—should include 'any stable and permanent group' (§516). This proposition without further elaboration appears unconvincing, given that the framers of the Convention, as clearly expressed in the text of that instrument, evinced an intention to protect only the four groups explicitly indicated there. The Chamber then propounded a definition of each of the four groups envisaged in the relevant rules. It defined 'national groups' as 'a collection of people who are perceived to share a legal bond of common citizenship, coupled with reciprocity of rights and duties' (§512), an 'ethnic group' as 'a group whose members share a common language or culture' (§513), a 'racial group' as a group 'based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious

factors' (§514), and a 'religious group' as a group 'whose members share the same religion, denomination or mode of worship' (§515).

It should be noted that in the particular case of the genocide of Tutsis by Hutus in Rwanda, the question of how to identify a protected group played a major role. Indeed, these two groups shared language, religion, and culture, lived in the same areas, and in addition there was a high rate of mixed marriages. The ICTR stressed that the two terms of Tutsi and Hutus before colonization by the Germans (1885-1916) and then by the Belgians (1916-1962) referred to individuals and not to groups, the distinction being based on lineage rather than ethnicity (§81). (Furthermore, Tutsis were originally shepherds, whereas Hutus were farmer.) However, in 1931 Belgians introduced a permanent distinction by dividing the population into three ethnic groups (Hutu, Tutsi, and Twa), making it mandatory for each Rwandan to carry an identity card that mentioned his or her ethnicity (§83). The TC concluded that thus in fact the members of the various groups ended up considering themselves as distinct from members of the other groups.

It would thus seem that for the TC in Akayesu the question of whether or not a multitude of persons made up a group protected by the rules against genocide was primarily a question of fact: the court had to establish whether (i) those persons were in fact treated as belonging to one of those protected groups; and in addition (ii) they considered themselves as belonging to one of such groups. One may find the same admixture of objective and subjective criteria in Kayishema and Razindana. There an ICTR TC stated that

An ethnic group is one whose members share a common language and culture: or a group which distinguishes itself, as such (self-identification); or a group identified as such by others, including perpetrators of the crimes (identification by others) (§98).

In Rutaganda the ICTR pushed the subjective standard even further. It noted that:

The concepts of national, ethnical, racial and religious groups have been researched extensively and [...] at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group (§56).

Also, two ICTY TCs, as well as the UN International Commission of Inquiry on Darfur, shared this subjective approach.

2.20.28 WHETHER GENOCIDE ALWAYS REQUIRES A GENOCIDAL POLICY OR PLAN

Various commentators have noted that acts of genocide by individuals or groups always presuppose a policy or at least a collective activity of a state, an entity or a group, policy or collective activity in which the individual perpetrators of genocide participate by their conduct.²⁶ Contrary to this view, the ICTY AC held in *felisic* that 'the existence of a plan or policy is not a legal ingredient of the crime', although 'it may facilitate proof of the crime' (AJ, 948).

I submit that both views do not construe the existing law correctly. Arguably a contextual element is not required by the customary and treaty rules on genocide for some instances of genocide, whilst it is needed for other categories. At least with regard to two categories of acts of genocide ((i) killing members of a protected group; (ii) causing serious bodily or mental harm to members of a

protected group), one or more individuals may engage in the crime of genocide without any general policy or collective action being required for their being prosecuted and punished for that crime. One or more individuals may, for example, kill a number of members of a religious group with genocidal intent, even if no state authorities or collectivity persecute and intend to destroy that group. Similarly, one or more persons may engage in rape or torture of members of an ethnic or racial group with the intent of thereby destroying the group in whole or in part. In other words, international rules do not require the existence of either a widespread or systematic practice or a plan as a legal ingredient of the crime of genocide. This conclusion is material at the procedural level, for it implies that the Prosecutor in a national or international trial need not lead evidence on that practice or contextual element. In reality, however, even genocidal acts belonging to one of the two categories at issue are hardly conceivable as isolated or sporadic events. Normally they are in fact part of a pattern of conduct tolerated, approved, or condoned by governmental authorities. These circumstances remain nevertheless factual events, not provided for or required by the relevant treaty and customary rules.

Instead, the other three categories of genocide perforce not only presuppose, but necessarily take the shape of, some sort of collective or even organized action (I am referring to (i) deliberately inflicting on a protected group or members thereof conditions of life calculated to bring about its physical destruction in whole or in part; (ii) imposing measures intended to prevent births within a protected group; (iii) forcibly transferring children of a protected group to another group). Plainly, actions such as deliberate deprivation of resources indispensable for the survival of members of a protected group, e.g. food or medical supplies, or such action as systematic expulsion from home with a view to bringing about conditions of life leading to the destruction of the group, constitute actions that are necessarily carried out on a large scale and by a multitude of individuals in pursuance of a common plan, possibly with the support or at least the acquiescence of the authorities. Similarly, such measures designed to prevent births as prohibition of marriages, separation of the sexes, forced birth control, sterilization, large-scale sexual mutilation, are all activities that only state organs or other official

authorities may undertake, or authorize to undertake, or at least approve or condone.

2.20.29 HOW TO IDENTIFY GENOCIDAL INTENT

The ICTR TCs have contributed greatly to elucidating the subjective element of genocide. As noted, in *Akayesa* an ICTR TC held that intent 'is a mental factor which is difficult, even impossible to determine' (§523).

Indeed, normally to prove the existence of genocidal intent one has to infer such intent from factual circumstances. Only seldom can one find documents or statements by which one or more persons explicitly declare that they intend to destroy a whole group. An instance of such statements can be found in the minutes (drafted by Eichmann) of the discussion held at Wannsee (Berlin) on 20 January 1942 to plan the extermination of the European Jews,³⁰ as well as in the speech Heinrich Himmler (head of the SS) made on 4 October 1943 in Poznan to SS officers³¹ to the same effect.

In other instances utterances against a particular group expressing the intent to destroy (or to contribute to destroy) the group, were not taken to express genocidal intent proper. A case in point is *Felisić*. An ICTY TC held that his repeated statements against Muslims and the consequent criminal offences perpetrated by him against many Muslims did not manifest genocidal intent but were expression of 'a disturbed personality' (§§102-7). The AC took a different (and a more correct) view, ruling that the accused had instead entertained genocidal intent (§§55-72), although it then oddly declined to reverse the acquittal for genocide entered by the TC and remit the case for further proceedings.

In *Krstić* an ICTY TC made a considerable contribution, in various respects, to the definition of *mens rea* of genocide. The Prosecution, as noted above, accused the defendant of genocide for having planned and participated in the massacre in a limited locality (the area of Srebrenica), of between 7,000 and

8,000 Bosnian Muslims, all of them men of military age. The following question then arose: was this intent present in this case where only men of military age were systematically killed? The Chamber answered the query in the affirmative. It emphasized that the rest of the Bosnian Muslim population had been forcibly transferred out of the area, with the inevitable result of the physical disappearance of the whole Muslim population of Srebrenica.³² The Chamber concluded that the intent to kill all the Bosnian Muslim men of military age in Srebrenica evinced the intention to destroy in part the Bosnian Muslim group and therefore must qualify as genocidal intent.

As pointed out above, the special intent under discussion is normally deduced from the factual circumstances. Hence, in those cases where the *actus reus* is murder or bodily or mental harm the question whether those acts were part of a plan or policy or of widespread or systematic practice may eventually acquire importance from an evidentiary viewpoint (although, as noted above, not as a legal ingredient of the crime), as an element capable of proving (or confirming) that there was indeed genocidal intent.

This is clear from what an ICTR TC held in some cases, for instance in *Akayesu* and in *Kayishema and Ruzindanda*. In the former case the TC inferred the special intent from the speeches by which the accused called, 'more or less explicitly', for the commission of genocide (§729). It also deduced intent from the very high number of deliberate and systematic atrocities committed against the Tutsis (§730) and the numerous and systematic acts of rape and sexual violence against Tutsi women (§§731-3). Also in *Kayishema and Ruzindanda* the TC inferred genocidal intent from the high number of Tutsis killed (§531 and 533), the fact that they had been massacred regardless of gender or age (§532), as well as the fact that the attacks had been carried out in a consistent and methodical way (§§534-6 and 543). The utterances of the two defendants were also taken into account (for instances, Tutsis had been called 'cockroaches', had been referred to as 'dirt' or 'filth' (§538); if particular, Ruzindana had stated that babies whose mothers had been killed must not be spared 'because those attacking the country initially left as children' (at §542).

Similarly, in *Musema* an ICTR TC inferred special intent to destroy Tutsis from (the numerous atrocities committed against them (§928), from large-scale attacks launched against Tutsi civilians (§930) and, more generally, from the widespread and systematic perpetration of other criminal acts against members of the Tutsi group' (§931) in which the defendant participated. These acts were accompanied by humiliating utterances.³³

When the objectively genocidal act is part of a whole pattern of conduct taking place in the same state (or region or geographical area), or, a fortiori, of a policy planned or pursued by the governmental authorities (or by the leading officials of an organized political or military group), then it may become easier to deduce not only the intent³⁴ but also lack of intent from the facts of the case. Thus, the UN Commission of Inquiry on Darfur held that a range of acts or conducts by the Sudanese governmental authorities committed in breach of international rules evinced that the intent to destroy an ethnic group in whole or in part was lacking.)

If instead no policy or plan or widespread practice may be discerned, it may turn out to be extremely difficult to prove the required intent. The Commission of Inquiry on Darfur stated that the fact that no genocidal intent could be imputed to the Sudanese authorities did not exclude that such special intent might be entertained by single individual Sudanese servicemen or militias fighting on behalf of or together with the Sudanese armed forces. To establish the existence of such intent in specific cases was, according to the Commission, a task falling to a competent court of law (§§520-1).

2.20.30 GENOCIDE AND CRIMES AGAINST HUMANITY

As emphasized above, large-scale massacres of ethnic or religious groups were first criminalized as a subclass of the category of crimes against humanity. However, after the adoption of the Genocide Convention of 1948 and the gradual transformation of its main substantive provisions into customary international law, genocide became a category of crimes *per se*, with its own specific *actus reus* and *mens rea*.

True, both categories share at least three elements: (i) they encompass very serious offences that shock our sense of humanity in that they constitute attacks on the most fundamental aspects of human dignity; (ii) they do not constitute isolated events but are instead always part of a larger context, either because they are large-scale and massive infringements of human dignity or because they are linked to a broader practice of misconduct; and (iii) although they need not be perpetrated by state officials or by officials of entities such as insurgents, they are usually carried out with the complicity, connivance, or at least the toleration or acquiescence of the authorities.

However, the objective and subjective elements of the two crimes differ in many respects (see also *supra*, 6.5). As for the objective element, the two crimes may undoubtedly overlap to some extent: for instance, killing members of an ethnic or religious group may as such fall under both categories; the same holds true for causing serious bodily or mental harm to members of a racial or religious group, or even for the other classes of protected group. However, crimes against humanity have a broader scope, for they may encompass acts that, as such, do not come within the purview of genocide (for instance, imprisonment and torture)—unless they amount to acts inflicting on members of a group conditions of life calculated to bring about the physical destruction of the group. By the same token, there may be acts of genocide that are not normally held (at least under the Statutes of the ICTY, ICTR, and the ICC) to fall within the other category of crime (for instance, killing detained military personnel belonging to a particular religious or racial group, by reason of their membership of that group). Thus, from the viewpoint of their objective elements, the two categories are normally 'reciprocally special', in that they form overlapping circles which nevertheless intersect only tangentially.

By contrast, from the perspective of the *mens rea*, the two categories do not overlap at all. In the case of crimes against humanity, international law requires the intent to commit the underlying offence plus knowledge of the widespread or systematic practice constituting the general context of the offence. For genocide,

what is required is instead the special intent to destroy, in whole or in part, a particular group, in addition to the intent to commit the underlying offence. From this viewpoint, the two categories are therefore 'mutually exclusive'. They form two circles that do not intersect. The only exception is the case where the underlying *actus reus* is the same, for instance, murder; in this case, the intent to kill is required in both categories; nevertheless genocide remains an autonomous category, for it is only genocide that also requires the intent to destroy a group. Similarly, it is only for crimes against humanity that knowledge of the widespread or systematic practice is required. As for persecution, the intent of seriously discriminating against members of a particular group is shared by both crimes against humanity and genocide. For persecution-type crimes against humanity, however, it is sufficient to prove that the perpetrator intentionally carried out large-scale and severe deprivations of the fundamental rights of a particular group, whereas for genocide it is necessary to prove the intent to destroy a group, in whole or in part.

I should add that, depending on the group targeted and the accompanying intent, the same objective conduct may give rise to a combination of both genocide and crimes against humanity. For instance, the Hutus' massacres of Tutsis in Rwanda in 1994 amounted to genocide, whereas their simultaneous or concomitant killing of moderate Hutus constituted a crime against humanity.

2.20.31 ARTICLE 6 OF THE ICC STATUTE AND CUSTOMARY INTERNATIONAL LAW

Article 6 of the ICC Statute reproduces word for word Article II of the Genocide Convention and the corresponding customary rule. In contrast, Article III of the Convention (and the corresponding customary rule) on responsibility for forms of participation in the crime other than perpetration, namely conspiracy, incitement, attempt, and complicity, have not been taken up in the provision on genocide, either because the notion has not been accepted by the Rome Diplomatic Conference (as was the case with conspiracy, a concept that has not found the support of all the civil law countries present at Rome), or because the relevant

notion is laid down in general terms (i.e. in terms applicable to other crimes as well) in other provisions of the ICC Statute: this applies to incitement (at present envisaged in Article 25(3)(e)), attempt (which is provided for in Article 25(3)(f)), and complicity (which is contemplated in Article 25(3)(e) and (d)).

It follows that in at least one respect there is an inconsistency between customary international law and the Rome Statute. The former prohibits and makes punishable 'conspiracy to commit genocide'; that is, an inchoate crime consisting of the planning and organizing of genocide not necessarily followed by the perpetration of the crime, whereas Article 6 does not contain a similar prohibition.

It should be noted that in the process of drafting Article 6, in February 1997 it was suggested in the Working Group of the Preparatory Committee that 'the reference to "intent to destroy in whole or in part [...] a group as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group'.³⁷ This suggestion was aptly assailed by two commentators, who noted that nothing in the Genocide Convention could justify such a restrictive interpretation and that, in addition, international practice belied this interpretation, for 'successful counts or prosecutions of crimes against humanity, of which genocide is a species, have involved relatively small numbers of victims'.³⁸ It would seem that the customary international rule, as codified in Article 6, does not require that the victims of genocide be numerous. The only thing that can be clearly inferred from the rule is that genocide cannot be held to occur when there is only one victim (see above 6.4). However, as long as the other requisite elements are present, the killing or commission of the other enumerated offences against more than one person may amount to genocide.

Finally, one should note a further view put forth with regard to the mens rea element of genocide. According to the proponent of this view, the ICC Statute 'appears to allow' that 'genocide may be committed with a lower level of mens rea' than the very high intent requirement mentioned above, for it 'contemplates

[in Article 28, on command responsibility] liability of commanders for genocide committed by their subordinates even if they have no real knowledge of the crime'. It may be objected that this could be true only with regard to the case where the superior knows that genocide is about to be perpetrated, or is being committed, and deliberately refrains from forestalling the crime or stopping it. Indeed in this case, according to a widespread opinion, the superior may be equated to a co-perpetrator, or at least an aider and abettor (see *infra*, 11.4.2-4). Instead, one could not accuse a superior of genocide (as a co-perpetrator or an accomplice) when the superior fails to punish the subordinates who have engaged in genocide; or when, although he has information that should enable him to conclude that genocide is being committed or may be committed, fails to act, in breach of his supervisory obligations (see Article 28(l)(a) and (2)(a)). In these cases the superior would be guilty of a different offence: intentional, reckless, or grossly negligent breach of his supervisory duties. It follows that, with regard to such cases, it 'would not be correct to assert that he should be held responsible for genocide, although with a subjective element lower than specific intent.

2.20.32 The Definition, elements and meaning of International Crimes i.e. genocide, crimes against humanity and War Crimes according to various International Instruments

2.20.33 GENERAL

As in any national legal system, also in ICL responsibility arises not only when a person materially commits a crime but also when he or she engages in other forms or modalities of criminal conduct. In the following paragraphs I shall set out these different modalities of participation.

Before I do so, it may however prove fitting to discuss briefly the position in national legal systems. They converge in holding that, where a crime involves more than one person, all performing the same act, all are equally liable as co-perpetrators, or principals. In contrast, national legal orders differ when it comes

to the punishment of two or more persons participating in a crime, where these persons do not perform the same act but in one way or another contribute to the realization of a criminal design.

For instance, A draws up plans for a bank robbery, B provides the weapons, C performs the actual robbery, D acts as a lookout, E drives the getaway car, and F hides the loot and in addition gives shelter to the robbers. Many systems (for instance those of the US, France, Austria, Uruguay, and Australia) do not make any legal distinction between the different categories of participant and mete out the same penalty to each participant, whatever his role in the commission of the crime. As the California Penal Code provides at §31, all those 'concerned in the commission of a crime' including those who aid and abet the crime, are to be held liable as principals.

In spite of this legal regulation, for classificatory purposes and to aid analysis, legal commentators and courts use descriptive terms to distinguish between the various categories of participant: in the example given above, A is an 'accessory before the fact' (he is not a 'principal' for he was not present when the robbery was perpetrated), B is an aider and abettor (or an 'accessory before the fact'), C is a 'first degree principal', D and E are 'second degree principals', and F is an 'accessory after the fact'. However, as noted above, under the general sentencing tariff no distinction is made between these different categories of person. It is only provided that for accomplices or accessories extenuating circumstances may be taken into account if their participation in the offence is less serious than that of the principal or principals. In fact, for the purposes of sentencing, judges often draw a distinction between principals, instigators, and aiders and abettors.

In other national legal systems (for instance, Germany, Spain, and Russia) the law draws instead a normative distinction between two categories—principals, and accomplices or accessories—and provides in terms that the persons falling under the latter category must be punished less severely. Thus, for instance, in

German law, the scale of penalties for accomplices (at least in the case of aiders and abettors, *Gehilfe*) is less harsh than for the perpetrator (*Tater*).⁷⁵

We will see that in international law neither treaties nor case law (as indicative of customary rules) make any legal distinction between the various categories, at least as far as the consequent penalties are concerned. This lack of distinction follows both from: (i) the absence of any agreed scale of penalties in ICL; and from (ii) the general character of this body of law; that is, its still rudimentary nature and the ensuing lack of formalism (see *supra*, 1.2).

Consequently, the differentiation between the various classes of participation in crimes, which I shall set out below, is merely based on the intrinsic features of each modality of participation. It serves a descriptive and classificatory purpose only. It is devoid of any relevance as far as sentencing is concerned. It is for judges to decide in each case on the degree of culpability of a participant in an international crime and assign the penalty accordingly, whatever the modality of participation of the offender in the crime.

2.20.34 PERPETRATION

Whoever physically commits a crime, either alone or jointly with other persons, is criminally liable. For instance, the soldier who kills a war prisoner or an innocent civilian is liable to punishment for a war crime. Similarly, the serviceman who rapes an enemy civilian as part of a widespread or systematic attack on civilians is accountable for a crime against humanity,

Perpetration is thus the physical carrying out of the prohibited conduct, accompanied by the requisite psychological element.⁷⁶

⁷⁵ In two cases, the Extraordinary Courts Martial established in the Ottoman Empire to try persons accused of participating in massacring Armenians in 1915 and plundering their possessions, applied the Imperial Military Penal Code', which drew a normative distinction between principals and accessories. The Court therefore made a point of distinguishing between the 'principal perpetrators' and the 'accessories', and assigning a different sentence to each category of defendant. In *Kemal and Tevfik* U sentenced the principal perpetrator to death and the accessory to 15 years of hard labour (at 5-6, or 157-8); in *Bahaeddirt Sdkir* and others the majority of judges held that two defendants were accessories, while three dissenting judges held that they 'were equally guilty of having been principal co-perpetrators' (at 4 and 8 or 171 and 173).

2.20.35 CO-PERPETRATION

Crimes are often committed by a plurality of persons. If all of them materially take part in the actual perpetration of the same crime and perform the same act (for instance, they are all members of an execution squad shooting innocent civilians), we can speak of co-perpetration. All participants in the crime partake of the same criminal conduct and the attendant mens rea.

2.20.36 PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE TO COMMIT INTERNATIONAL CRIMES

2.20.37 INTRODUCTION

International crimes such as war crimes, crimes against humanity, genocide, torture, and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by a multitude of persons: military details, paramilitary units or government officials acting in unison or, in most cases, in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the criminal enterprise or collective crime, on two grounds.

First, not all participants may have acted in the same manner, but rather each of them may have played a different role in planning, organizing, instigating,

⁷⁶ In some cases courts have minimized the role of perpetrators executing illegal orders. This for instance holds true for Alfons Gotzfrid, which concerns mistreatment at the Majdanek camp. The Stuttgart Court (Landgericht) held that 'According to established case-law [...], the offender or accomplice is defined as one whose thoughts and actions coincide with those of the author of the crime, who willingly gives in to incitement to political murder, silences his conscience and makes another person's criminal aims the basis of his own conviction and his own action or who sees to it that orders of that kind are ruthlessly carried out or who in so doing otherwise displays consenting enthusiasm or who exploits State terror for his own purposes. Accordingly, the accused could only be shown to have an attitude denoting guilt if, over and above the activity he was instructed to carry out, he had performed some contributory act on his own initiative beyond the call of duty, shown particular enthusiasm, had acted with particular ruthlessness in the extermination operation or had shown a personal interest in the killings. These conditions cannot be shown to exist in the case of the accused. He was at the end of the chain of command, had no power of decision himself and no authority to act [...] Similarly, there is no evidence that the accused had any personal interest in the killing. He merely wanted to carry out the order which had been issued to him' (67, b).

coordinating, executing or otherwise contributing to the criminal conduct. For instance, in the case of torture one person may order the crime, another may physically execute it, yet another may watch to check whether the victim discloses any significant information, a medical doctor may be in attendance to verify whether the measures for inflicting pain or suffering are likely to cause death, so as to stop the torture just before the measures become lethal, another person may carry food for the executioners, and so on. The question arises as to whether all these participants are equally responsible for the same crime, torture. Similarly, in the case of deportation of civilians or prisoners of war to an extermination camp, a commander may issue the order, several officers may organize the transport, others may take care of food and drinking water, others may carry out surveillance over the inmates so as to prevent their escape, others may search the detainees for valuables or other things before deportation, and so on. Secondly, the evidence relating to each individual's conduct may prove difficult, if not impossible, to find. It would, however, be not only immoral, but also contrary to the general purpose of criminal law (to protect the community from the deviant behaviour of its members that causes serious damage to the general interests) to let those actions go unpunished. These considerations a fortiori apply to crimes such as murder or aggravated assault committed by a whole crowd; in such cases, it may prove even more difficult to collect evidence about the exact participation of members of the . crowd in the crimes. The same considerations also hold true for cases where crimes are institutionally committed within organized and hierarchical units such as internment, detention, or concentration camps, where it is difficult to pinpoint the gradations of culpability of the various persons working within and for the organization.

As in most national legal systems, also in ICL all participants in a common criminal action are equally responsible if they (i) participate in the action, whatever their position and the extent of their contribution, and in addition (ii) intend to engage in the common criminal action. Therefore they are all to be

treated as principals⁷⁷ although of course the varying degree of culpability may be taken into account at the sentencing stage.⁷⁸

The notion of joint criminal enterprise (JCE) denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan. At the same time, this notion does not run contrary to the general principles of criminal law. As in national legal systems, the rationale behind this legal regulation is clear: if all those who take part in a common criminal action are aware of the purpose and character of the criminal action and share the requisite criminal intent, they must perforce share criminal liability, whatever the role and position they may have played in the commission of the

⁷⁷ However, some courts of common law countries have taken the view that participants in a common criminal design may play the role of, and be regarded as, accessories. Thus, for instance, in *Einsatzgruppen*, with regard to common design, the Prosecutor T. Taylor, in his closing statement noted that 'the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, §2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility' (372).

⁷⁸ In this connection one may mention, by way of example, a decision of the Supreme Court of Bosnia and Herzegovina in *Tepez*, delivered on 1 October 1999: 'The appeal by the defence counsel argues that the contested judgment has not individualised the criminal responsibility of the accused and his personal involvement in actions characteristic of a war crime against the civilian population. For this crime to exist it is necessary to "commit murder, torture, inhumane acts, inflict severe suffering, physical and mental injuries on civilians, destroying their health and physical integrity". The disposition does not include these essential elements of this criminal act and therefore represents a major violation of the provisions of criminal procedure. This Court finds these allegations groundless. The appeal fails to note that the contested judgment states that the accused carried out these actions with three other named individuals (as well as others), which means that he perpetrated the crime for which he has been pronounced guilty in complicity with others. It further means that in cases of this kind where it is not possible to isolate individual actions and their consequences or to distinguish the degree to which each person was involved in their execution, it suffices that these actions complement each other and together form a single entity, which the accused [*Tepe*] wishes to achieve by being involved. Therefore it was neither possible nor necessary for the court of first instance to separate only the actions of the accused. It suffices that the accused participated in executing these actions, even if it had only been one or two actions of personal involvement in the beating of civilians. However, the court of first instance has established that the accused personally beat up many individuals on many occasions' (2).

Also the decision of a Canadian court in *Moreno* deserves mentioning: In reaching this conclusion, I am influenced by one commentator's view that the closer a person is involved in the decision-making process and the less he or she does to thwart the commission of inhumane acts, the more likely criminal responsibility will attach (...) of course, the further one is distanced from the decision makers, assuming that one is not a "principal", then it is less likely that the required degree of complicity necessary to attract criminal sanctions, or the application of the exclusion clause, will be met' (18). See also *Ramirez* (6-9)

crime. This is the case because: (i) each of them is indispensable for the achievement of the final result; and on the other hand (ii) it would be difficult to distinguish between the degree of criminal liability, except for sentencing purposes.

Thus, it is by now widely accepted by international criminal courts that in the case of collective' criminality where several persons engage in the pursuit of a common criminal plan or design, all participants in this common plan or design may be held criminally liable for the perpetration of the criminal act, even if they have not materially participated in the commission of said act; in addition, they may also be held responsible, under a number of well-defined conditions, for criminal conduct that, although not originally envisaged in the common criminal design, has been undertaken by one of the participants and may to some extent be regarded as a natural and foreseeable consequence of such a common plan. It is also widely accepted that at the international level this mode of criminal liability can take three different forms. It was the ICTY AC that first articulated in Tadic (A] 1999) the doctrine of ICE as a fully fledged legal construct of modes of criminal liability. However, the doctrine had already been upheld at the national or international level by various courts, if only in passing. In Tadic (A] 1999) the ICTY AC spelled out the three categories I will refer to below.

2.20.38 LIABILITY FOR A COMMON INTENTIONAL PURPOSE

(A) The notion

The first and more widespread category of liability is responsibility for acts agreed upon when making the common plan or design. Here all the participants share the same intent to commit a crime, and all are responsible, whatever their role and position in carrying out the common criminal plan (even if they simply vote, in an assembly or in a group, in favour of implementing such a plan). In addition to shared intent, *dolus eventualis* (i.e. recklessness or advertent recklessness) (see *supra*, 3.7) may also suffice to hold all participants in the common plan criminally liable. For instance, if a group of servicemen decides to

deprive civilians of food and water in order to compel them to build a bridge necessary for military operations or to disclose the names of other civilians who have engaged in unlawful attacks on the military, and then some civilians die, the servicemen should all be accountable not only for a ICE to commit the war crimes of intentionally starving civilians and 'compelling the nationals of the hostile party to take part in operations of war directed against their own country; they should also be held guilty of murder. Indeed, even if the servicemen did not intend to bring about the death of the civilians, the death was the natural and foreseeable consequence of their common criminal plan and the follow-up action.

Society—in our case the world community—must defend itself from this collective criminality by reacting in a repressive manner against all those who, in some form, took part in the criminal enterprise. Society may not indulge in distinctions between the different roles played by each of the participants when trying to uproot or, better, punish this form of collective criminality. All actors are guilty, even though in some instances the mens rea (for example, intent to murder) is not attended by the corresponding conduct (for example, stabbing or firing a gun); this applies to all those who, while sharing the criminal intent, do not carry out the primary crime (for example, the driver or the look-out in an armed robbery involving murder). However, the differing degrees of culpability can be taken into account at the stage of sentencing.

(B) Case law

In Ponzano, a case concerning the unlawful killing of four British prisoners of war by German troops, the Judge Advocate adopted the approach suggested by the Prosecutor, and stressed the requirement that an accused, before he can be found guilty, must have been concerned in the offence (...T]o be concerned in the commission of a criminal offence [...] does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation [...l]n other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a

criminal offence to be committed, but he can further that object by a variety of other means (at 7). The Judge Advocate also underlined that the accused should have knowledge of the intended purpose of the criminal enterpriser.⁷⁹

In 2001, in *Krstic*, an ICTY TC held that the defendant had participated in a ICE to commit genocide. The Court explained at length that initially *Krstic* had only taken part in a common plan to forcibly expel Muslims from the area of Srebrenica; however, later on, when it became apparent that the various military leaders in fact were planning the killing of thousands of military-aged men, the defendant showed, through his various acts and behaviour, that he shared the 'genocidal intent to kill the men' (§§621-45). The Chamber therefore found *Krstic* guilty of genocide and sentenced him to 46 years in prison. The AC held instead that *Krstic* was only guilty of complicity in genocide, for he had not shared the genocidal intent but simply aided and abetted genocide. It reduced his sentence to 35 years' imprisonment.

In 2003, in *Blagojevic, Simic and others* an ICTY TC held that the three accused, Bosnian Serbs operating in the municipalities of Bosania Herzegovina'; and Odzak in Bosnia Herzegovina, committed various crimes there. The main defendant, *Simic* (who, at the time of the conflict, was the President of the Municipal Assembly and of the Crisis Staff, later renamed 'the War Presidency'), participated in a basic form of JCE. He shared with others the intent to execute a common plan of persecution of non-Serb civilians in the Bosanski Samac

⁷⁹ *Georg Otto Sandrock et al.* (also known as the Almelo Trial) can also be cited. Three Germans had killed a British prisoner of war; it was clear that they had all had the intention of killing the British soldier. although each of them played a different role. The British Court found all of them guilty of murder under the doctrine of common enterprise' (at 35,40-1). In *Holzer and others*, brought before a Canadian military court, in his summing up the ludge Advocate emphasized that the three accused (Germans who had killed a Canadian prisoner of war) knew that the purpose of taking the Canadian to a particular area was to kill him. The ludge Advocate spoke of a 'common enterprise' with regard to that murder (at 341, 347, 349). In *Jepsen and others* a British court had to pronounce upon the responsibility of Jepsen and others for the death of inmates of a concentration camp in transit to another concentration camp. The Prosecutor argued that '[I]f lepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act'. The Judge Advocate did not rebut the argument (at 241). In *Schonfeld* the ludge Advocate stated that: 'ifsev-eral persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present f...] provided that the death was caused by a member of the party in the course othis endeavours to effect the common object of the assembly' (68).

municipality. According to the TC, Simic, as the highest-ranking civilian in the municipality, acted in unison with others to execute a plan that included: the forcible takeover of the town of Bosanski Samac, and the persecutions of non-Serb civilians in the area, which took the form of unlawful arrests and detention, cruel and inhumane treatment including beatings, torture, forced labour assignments, and confinement under inhumane conditions, deportations and forcible transfers. The Chamber held that he was a participant in the JCE, while no evidence permitted the conclusion that the other two defendants were also participants (TC, 2003, §§144-60,983-1055).⁸⁰

The ICTY took an important stand in Brdanin in 2004. In the indictment, the Prosecution had alternatively pleaded the defendant's criminal responsibility pursuant to the first and third categories of JCE (on this third category see *infra*, 9.4.4). With respect to the first category, the Prosecution alleged in the various counts that '(the purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged'. The alternative pleading of the third category specified that '(the defendant) [was] individually responsible for the crimes enumerated in [various counts] on the basis that these crimes were natural and foreseeable consequences of the acts' of deportation and forcible transfer of civilians. The Chamber noted that for both categories of crimes to materialize, it was required to prove not only the existence of a common criminal plan, but also that the crimes had been perpetrated by one or more participants in such common plan. However, in the case at issue the crimes had been committed by members of the army, police, and para-military groups that had not participated in the criminal plan or

⁸⁰ It should be noted that the ICTR upheld the doctrine at issue as well. In *Rwamakuba* (Decision on Interlocutory appeal) the AC held that the Tribunal had jurisdiction to try the appellant on a charge of genocide through the mode of liability of ICE (§§9-39). In *Elizaphan Ntakirutimana and Gerard 'akirutimana* the AC relied upon the first category of JCE, but found that the TC had been correct in not applying the doctrine to the case at issue (§§462,466,468-84). In *Simba*, in 2005, an ICTR TC held [hat the accused was guilty of JCE to commit genocide and extermination (§§386-96, 411-19, 420-6). In another case where the Prosecution had similarly charged a person with JCE to commit genocide and extermination (*Mpambara*), an ICTR TC held instead that no proof beyond a reasonable doubt had been tendered that the accused possessed the intent to be part of a JCE. It consequently acquitted him on all counts of the indictment (§§13-4,38-40, 76, 113,164).

enterprise (§345)⁸¹ The Chamber therefore dismissed the applicability of the notion of crimes to those crimes (§§351 and 355). However, the AC reversed the TC decision on this issue, taking the contrary view. After reviewing post-Second World War case law it concluded that such case law recognizes the imposition of liability upon an accused for his participation in a common criminal purpose, where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose and that in addition it does not require proof that there was an understanding or agreement to commit that particular crime between the accused and the principal perpetrator of the crime. The AC thus held that [V]hat matters in a first category ICE is not whether the person who carried out the *actus reus* of a particular crime is a member of crimes, but whether the crime in question forms part of the common purpose, in cases where the principal perpetrator of a particular crime is not a member of the JCE, this essential requirement may be inferred from various circumstances, including the fact that the accused or any other member of the ICE closely cooperated with the principal perpetrator in order to further the common criminal purpose. In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that the person in question knows of the existence of the ICE—without it being established that he or she shares the *mens rea* necessary to become a member of the JCE—may be a factor to be taken into account when determining whether the crime forms part of the common criminal purpose. However, this is not a *sine qua non* for imputing liability for the crime to that member of the JCE (§410). (...) Considering the discussion of post-World War II cases and of the Tribunals jurisprudence above, the Appeals Chamber finds that, to hold a member of the JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member—when using a principal perpetrator—acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis (§413).

⁸¹ The TC had set out the same view in a previous decision in the same case (Brdanin, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, §44).

The AC clinched the point by adding, always in light of post-Second World War jurisprudence, that when the principal perpetrator is not part of the JCE, for the accused to be held liable for the crime perpetrated, an understanding or an agreement between the accused and the principal perpetrator of the crime is not necessary. It may suffice that the crime at issue be part of the common criminal purpose (§§415-19) and the accused 'uses' the principal perpetrator to further that purpose (§§430-1).

For the reasons set out below (§§9.4.5), it is respectfully submitted that this broadening of the notion under discussion is excessive and raises doubts about its consistency with the *nullum crimen* principle and the principle of personal responsibility. The AC'S ruling in *Brctdililn* seems all the more objectionable because in the same case the Chamber also held that the doctrine of the JCE extends to large-scale cases' or in other words covers instances where crimes are perpetrated on a large scale by individuals who are remote from the accused (§§420-5).

2.20.39 LIABILITY FOR PARTICIPATION IN A COMMON CRIMINAL PLAN WITHIN AN INSTITUTIONAL FRAMEWORK

(A) The notion

The second modality of liability is that of responsibility for carrying out a task within a criminal design that is implemented in an institution such as an internment, detention, or concentration camp. In one such camp where inmates are severely ill-treated and even tortured, not only the head of the camp, but also his senior aids and those who physically inflict torture and other inhuman treatment bear responsibility for those acts. In addition to those who physically carry out the misdeeds, also those who discharge administrative duties indispensable for the achievement of the camp's main goals (for example, to

register the incoming inmates, record their death, give them medical treatment, or provide them with food) may incur criminal liability.

They bear this responsibility so long as they (i) are aware of the serious abuses being perpetrated (knowledge); (ii) willingly take part in the functioning of the institution (intent); and (iii) make an important contribution to the pursuit of the institution's goals. That they should be held responsible is only logical and natural: by fulfilling their administrative or other operational tasks, they contribute to the commission of crimes. Without their willing support, crimes could not be perpetrated. Thus, however peripheral their role, they may constitute an indispensable cog in the murdering machinery. The man who, upon arrival of new trains at Auschwitz, separated the men and the women from the children and the elderly, knowing that this served to establish who should be a forced laborer and who should instead be sent immediately to gas chambers, was instrumental in the perpetration of extermination. Had he intended to shirk criminal responsibility, he should have asked to be relieved of his duties and to discharge other duties elsewhere. This decision was possible and was sometimes made (although it often involved being sent to combat zones on the Eastern Front). Similarly, the locomotive driver of a train that carried hundreds of detainees to Auschwitz could have been held criminally liable for his participation in extermination, so long as he knew what would happen to the persons he was transporting and showed to share the intent to exterminate those persons by willingly continuing to fulfill his role (instead of asking to be exempted from this horrible task).

It can thus be noted that for this mode of liability no previous plan or agreement is required. Nevertheless, one can legitimately hold that each participant in the criminal institutional framework not only is cognizant of the crimes in which the institution or its members engage, but also implicitly or expressly shares the criminal intent to commit such crimes. It cannot be otherwise, because any person discharging a task of some consequence in the institution could refrain from participating in its criminal activity by leaving it. As pointed out above, for criminal liability to arise it is also necessary that the person at issue make a

substantial contribution to the joint criminal enterprise. It follows that those who, for example, merely sweep the streets or clean the laundry should not incur criminal liability for their action, although they may both be aware of the criminal purpose pursued by the whole institution and share it.

Clearly, this mode of responsibility is very close to that of criminal organizations laid down in the IMT Charter annexed to the London Agreement of 8 August 1945 (Articles 9-11), and upheld in some respects by the IMT at Nuremberg (see *infra*, 2.2). Indeed, in both cases belonging to and operating for an organization (or an institutional framework) that primarily or at least in part pursues criminal purposes involves, subject to certain conditions, the personal guilt of a member. However, the conditions for personal liability of a member to arise are only partially similar. True in both cases membership as such is not punishable. In both cases it is necessary for the member to have knowledge of the criminal acts being committed or be personally implicated in the commission of such acts.⁸² However, in the case of criminal organization this would be sufficient, for the assumption is that the organization as such institutionally pursues a criminal purpose (e.g. extermination of a racial or religious group). Instead, in the JCE under consideration, since the institutional aims are not per se criminal (the camp has been established to detain prisoners of war, or intern enemy civilians, etc.), but the institution is incidentally used for criminal purposes (torture, murder, extermination, rape, etc.), it is also necessary for a member to make a substantial contribution to the furtherance of criminal purposes, for his liability to arise.

(B) Case law

One can find a particularly clear and significant illustration of this category of criminality in Alfons Klein and others (the Hadamar trial), heard by a US Military

⁸² In *Goring and others* the IMT held that the definition of criminal organization 'should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 or the Charter as members of the organization' (at 256).

Commission sitting at Wiesbaden. It is fitting to dwell on this case at some length, because it best shows how the category of criminality at hand works.

The accused were seven Germans. Between July 1944 and April 1945, they killed over 400 Polish and Russian nationals, who had been obliged to work in Germany for the German war effort and were suffering from tuberculosis or pneumonia. Brought to Hadamar, in Germany, where there was a hospital or institution originally designed to care for the mentally unsound, but with no medical facilities to treat persons ill with tuberculosis or pneumonia, they were told that they would be given medication. In fact they were killed by injections of poisonous drugs; afterwards the relevant medical records and death certificates were falsified. It would seem that the primary purpose of these killings was to make space in hospitals for German war victims. The accused comprised Klen, the administrative head of the hospital, a local Nazi Party leader who made all the arrangements leading to the perpetration of the atrocities; Wahlmann, a physician specializing in mental diseases, the Institution's only doctor (he participated in the conferences designed to plan the murders, knew what was going on at the hospital, and acquiesced in it); three nurses, Ruoff, Willig, and Huber, who administered the poisonous drugs; Merkle, the institution's book-keeper (who registered incoming patients for the purpose of recording dates and causes of death, actually falsifying these documents); and Blum, a doorman and telephone switchboard operator, who also served as caretaker of the cemetery, charged with burying the victims in mass graves (but he sometimes walked through the wards to inspect the victims before they were taken, dead, to his cellars a few hours later).

The charge for all of them was 'violation of international law', namely, as the Prosecutor specified in his opening argument, breach of the laws of warfare (at 202). The specification stated that the seven accused 'acting jointly and in pursuance of a common intent' did [...] willfully, deliberately and wrongfully aid, abet and participate in the killing of human beings of Polish and Russian nationality'. Thus, in addition to the notion of 'participation in killing based on common intent' also the notion of 'aiding and abetting' was used. However, in his

Opening Argument the Prosecutor, when setting out the applicable law (there was no Judge Advocate), emphasized that all those who participate in a common criminal enterprise are equally guilty as 'co-principals whatever the role played by each single participant. Referring to the case of murder committed by sever persons, he pointed out that

Every single one of those who participated in any degree towards the accomplishment of that result [murder] is as much guilty of murder as the man who actually pulled the trigger [...] That is why under our (that is US) Federal Law all distinctions between accomplices, between accessories before the fact and accessories after the fact, have been completely eliminated. Anyone who participates in the commission of any crime, whether formerly called as an accessory or no, are now co-principals and have been so for several years (203).

Moving then to the case at bar, the Prosecutor in fact offered an eloquent illustration of the rationale behind the legal notion he was invoking :

At this Hadamar mill there was operated production line of death. Not a single one of these accused could do all the things that were necessary in order to have the entire scheme of things in operation. For instance, the accused Klein, the administrative head, make arrangements for their death chamber, and at the same time go up these and use the needle that did the dirty work, and then also turn around and haul the bodies out and bury them, and falsify the records and the death certificates. No, when you do business on a wholesale production basis as they did at the Hadamar Institution, that murder factory, it means that you have to have several people doing different things of that illegal operation in order to produce the results, and you cannot draw a distinction between the man who may have initially conceived the idea of killing them and those who participated in the commission of those offences. Now, there is no question but that any person who participated in that matter, no matter to what extent, technically is guilty of the charge that has been brought [...] every single one of the accused has overtly and affirmatively participated in this entire network that brought about the illegal result (205-7).

The defence counsel did not dispute these concepts, but in their arguments preferred to rely upon the notions of necessity and superior orders, or argued that German law rather than US or international law should apply. The Court upheld the charge. The administrative head of the hospital and two nurses were sentenced to death; the physician (a 70-year-old man) to life imprisonment and hard labour; the book-keeper to 35 years and hard labour; the third nurse to 25 years and hard labour; the doorman and caretaker to 30 years and hard labour (at 247).

Courts also applied this notion of crimes in cases where the crimes had allegedly become committed by members of military or administrative units running concentration camps; that is, by groups of persons acting pursuant to a concerted plan.⁸³ In such cases the accused held some position of authority within the hierarchy of the concentration camps. Normally, the defendants were charged with having acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.⁸⁴ When found guilty, they were regarded as co-principals in the various crimes of ill-treatment, because of their objective 'position of authority' within the concentration camp system and because they had 'the power to look after the inmates and make their life satisfactory' but failed to do so. In these cases, as the ICTY AC pointed out in *Tadic* (AJ, 1999) the required actus reus was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The mens rea element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in

⁸³ See, for instance, such cases as Dachau Concentration Camp, brought before a US Tribunal under Control Council Law no. 10 (at 5. 14), Nadler and others, decided by a British Court of Appeal under Control Council Law no. 10 (at 132-4), Auschwitz Concentration Camp, decided by a German Court (at 882), as well as Belsen, decided by a British military court sitting in Germany (121).

⁸⁴ In his summing up in the Belsen case, the Judge Advocate took up the three requirements set out by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organized system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e. encouraged, aided, and abetted or in any case participated in the realization of the common criminal design (637-41).

these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime (§203).

Later on an ICTY TC invoked this mode of responsibility in 2001 in Kvočka and others. The Chamber found that the five defendants had occupied positions or roles in the operation of a detention camp at Omarska, where various crimes were committed (persecution, murder, and torture). Kvočka had been the camp commander's right hand; Kos was a guard shift commander; Radic was a shift commander. Zigic, who was a taxi driver in the Prijedor area during the period of 26 May to 30 August 1992, used to enter Omarska as well as other two camps for the purpose of abusing, beating, torturing, and killing prisoners. Finally, Prcac was de facto a deputy camp commander. According to the Chamber, the Omarska camp 'was a JCE, a facility used to interrogate, discriminate against, and otherwise abuse non-Serbs from Prijedor and which functioned as a means to rid the territory of or subjugate non-Serbs' (§323). The Chamber held that the continuous perpetration of crimes in the camp was common knowledge to anybody living there (§324). It held that all the accused formed part of a JCE to commit the crimes ascribed to them, and sentenced all of them to varying sentences. The AC confirmed the convictions and sentences.

It is worth stressing that the TC rightly emphasized the need for the participation of a person in an institutionalized JCE to be 'significant'; that is, through 'an act or omission that makes an enterprise efficient or effective; e.g. a participation that enables the system to run more smoothly or without disruption' (§309). It then wisely went on to note that the significance of the contribution is to be determined

on a case-by-case basis, taking into account a variety of factors (§311). On this point the AC took a slightly different stand.⁸⁵

In other cases the Chamber has stressed the need for the contribution of each participant in a JCE to be 'substantial'.⁸⁶ For instance, in *Lima* and others an ICTYTC found that the Prosecution had not proved that the three accused persons (members of the Kosovo Liberation Army) were liable for a joint criminal enterprise to commit in 1998 such crimes as torture, ill-treatment, and murder in a prison camp in Kosovo (§§665-70).

It bears noting that the requirement that the contribution of a participant in a JCE should be 'substantial' had not been envisaged by the ICTY AC in *Tadic* (A], 1999, §227). This requirement seems to the present writer to be indispensable.

2.20.40 INCIDENTAL CRIMINAL LIABILITY BASED ON FORESIGHT AND VOLUNTARY ASSUMPTION OF RISK:

(A) The notion

The third mode of responsibility concerns those participants who agreed to the main goal of the common criminal design (for instance, the forcible expulsion of civilians from an occupied territory) but did not share the intent that one or more members of the group entertained to also commit other crimes incidental to the main concerted crime (for instance, killing or wounding some of the civilians in the process of their expulsion). This mode of liability only arises if the participant

⁸⁵ It held that 'in general, there is no specific legal requirement that the accused make a substantial contribution to the JCE. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the JCE. In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose (§97). However, the Chamber subsequently held that in some exceptional cases the 'substantial' character of a participants contribution is needed (§599).

⁸⁶ *Ibid.*, §667

who did not have the intent to commit the 'incidental' offence, was nevertheless in a position to foresee its commission and willingly took the risk.

A clear example in domestic criminal law of this mode of liability is that of a gang of thugs who agree to rob a bank without killing anyone, and to this end agree to use fake weapons. In this group, however, one of the members secretly takes real weapons with him to the bank with the intent to kill, if need be. Suppose another participant in the common criminal plan sees this gang member stealthily carrying those weapons. If the armed man then kills a teller or bank officer during the robbery, the one who saw him take the real weapons may be held liable for robbery and murder, like the killer and unlike the other robbers, who will only be liable for armed robbery. Indeed, he was in a position to expect with reasonable certainty that the robber who was armed with real weapons would use them to kill, if something went wrong during the robbery. Although he did not share the mens rea of the murderer, he foresaw the event and willingly took the risk that it might come about (plainly, he could have told the other robbers that there was a serious danger of a murder being committed; consequently, he could either have taken the weapons away from the armed robber or withdrawn from the specific robbing expedition or even dropped out of the gang).

To clarify the matter, one should perhaps distinguish between an abstract and a concrete foreseeability of the unconcerted crime. Arguably, for criminal liability under the third category of ICE to arise it is necessary for the unconcerted crime to be abstractly in line with the agreed-upon criminal offence; in addition, it is also essential that the 'secondary offender' had a chance of predicting the commission of the unconcerted crime by the 'primary offender'. For instance, if a paramilitary unit occupies a village with the purpose of detaining all the women and enslaving them, a rape perpetrated by one of them would be in line with enslavement, since treating other human beings as objects may easily lead to raping them. It would, however, also be necessary for the 'secondary offender' to have specifically envisaged the possibility of rape (a circumstance that should be proved or at least inferred from the facts of the case), or at least to have been in a position to predict the rape.

Furthermore, we should ask ourselves whether the mens rea requirement for this JCE is the 'secondary offenders' subjective foresight of the likelihood of the crime being committed by the 'primary offender (i.e. the 'secondary offender' actually foresaw that the offence would be committed), or instead objective foreseeability of that likelihood (i.e. he ought to have foreseen that the crime was likely to be perpetrated). As the Supreme Court of Canada rightly pointed out in two celebrated decisions concerning constructive murder' (i.e. murder imputed to a person by law from his course of actions, though his deeds taken severally do not amount to voluntary murder), *R. v. Vaillancourt* (1987) and *R. v. Martineau* (1990), objective foreseeability constitutes a lower threshold.⁸⁷ This threshold the Court in *Vaillancourt* considered admissible in cases of 'constructive murder', whereas in *Martineau* the same Court held the subjective test to be more consonant with principles of fundamental justice. Probably the later ruling was also dictated by the fact that under Canadian legislation a finding of murder entails a mandatory sentence of life imprisonment; it was therefore felt necessary to raise the threshold of culpability for any such finding. Be that as it may, it would seem that at the inter- national level the lower requirement of objective foreseeability is upheld by case law, as proved by the cases that I will consider below. In other words, at the international level what is required is not that the 'secondary offender' actually predicted that the 'primary offender' would engage in unconcerted criminal conduct; the test is rather whether a man of reasonable prudence would have forecast that conduct, under the circumstances prevailing at the time. Three reasons seem to warrant the acceptance of a lower threshold at the international level. First, the crimes at issue are massive and of extreme

⁸⁷ See *R. v. Vaillancourt*, judgment of 3 December 1987, [1987] 2 S.C.R. 636 (online: www.scc.lexum.umontreal.ca/1987/1987rcs2-636, at 24-29) and *R. v. Martineau*, judgment of 13 September 1990, [1990] 2 S.C.R. 633 (online at: www.scc.lexum.umontreal.ca/1990/199rcs2-633, at 16-20). The facts in *Vaillancourt* are interesting. During an armed robbery, appellants accomplice shot and killed a client. He then escaped but the appellant was arrested and convicted of second degree murder (i.e. unlawful taking of human life with malice but without deliberation or premeditation) as a party to the offence. However, the two had previously agreed to commit the robbery armed only with knives; when on the night of the robbery the accomplice arrived with a gun, the appellant insisted that it be unloaded; the accomplice removed three bullets from the gun and gave them to the appellant, whose glove containing the three bullets was later recovered by the police at the scene of the crime. The Court upheld the appeal against conviction and ordered a new trial. As Judge L'Heureux-Dube later noted in his dissenting opinion in *Martineau*, "The facts themselves in *Vaillancourt* negated mens rea [...] Given these facts, it seems unlikely that *Vaillancourt*, or any reasonable person in his position, had reason to foresee that anyone would be killed in the course of the robbery" (at 29).

gravity; moreover, they are normally perpetrated under exceptional circumstances of armed violence. Under these circumstances one can legitimately expect that combatants and other persons participating in armed hostilities or involved in large-scale atrocities be particularly alert to the possible consequences of their actions. Secondly, the gravity of the crimes at issue makes it necessary for the world community to prevent and punish serious misconduct to the maximum extent allowed by the principle of legality. Thirdly, in ICL there is no fixed scale of penalties; courts are therefore free duly to appraise the level of culpability of the accused and impose a congruous sentence accordingly.

Some commentators have noted that the foreseeability standard on which this form of liability is based is unreliable, so much so that through such a standard—it has been claimed—the doctrine introduces a 'form of strict liability'. It has also been contended that this category of criminal enterprise disregards the necessity that a person be held guilty only if his culpability has been proven; or in other words, that the causal link between his conduct and *mens rea* on the one side, and the crime, on the other, be proved. Based on that doctrine, one would find a person guilty of, say, murder, even if that person lacked the requisite subjective element (intent or *dolus*) proper to the crime and only entertained a lesser form of *mens rea* (foreseeability plus willingly taking the risk that the crime be perpetrated; that is *dolus eventualis*). It would follow that the causal link between *mens rea* and conduct on the one side and the event or crime, on the other, would be lacking. Thus—so the objection continues—under certain conditions, one would place on a par the person who deliberately brought about the death of the victim with an individual who instead did not intend to cause such effect.

This objection is indisputably important,⁸⁸ and can be met by propounding three arguments.

⁸⁸ For critical remarks about ICE, see in particular I. D. Ohiin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, 5/ICJ(2007), 69-90, in particular 75-88 (this paper is, however, marred by the insistence on the concept of conspiracy and a misapprehension of the relevant international case law); E. van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', *ibid.*, 184-207, particularly 187-91; K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', *ibid.*, 159-83.

First, the foundation of this mode of responsibility is to be found in considerations of public policy; that is the need to protect society against persons who (i) band together to take part in criminal enterprises; and (ii) while not sharing the criminal intent of those participants who intend to commit more serious crimes outside the common enterprise, nevertheless are aware that such crimes may be committed; and (iii) do not oppose or prevent them. These policy considerations were aptly spelled out by the House of Lords in 1997, in two cases decided jointly, *Regina v. Powell and another and Regina v. English*⁸⁹, although the cases concerned

Less significant is the objection frequently heard whereby the category of ICE under discussion in fact amounts to, or is equally objectionable as, the common law concept of 'felony-murder'. Such concept, still widespread (albeit on the wane) in such countries as the UK, some states of the USA, New Zealand and certain Australian states, is substantially different from JCE. As first enunciated by Coke in 1797 (E. Coke, *The Third Part of the Institutes of the Laws of England*, London: Clarke and Sons, 181/, at 56), the concept entails that if an unlawful act involves the perpetration of murder, then the individual is guilty of murder (in the celebrated example by Coke, if a person (A), intending to steal a deer in the park of another person (B), throws an arrow at the deer but in so doing kills a boy hidden in a bush, he is guilty of murder 'for that act was unlawful, although A. had no intent to hurt the boy, nor knew not of him'). The concept has been widely criticized for it equates manslaughter (involuntary killing) to murder i.e. intentional killing of another person. In the case of the JCE we are discussing the secondary offender not only is involved in a common criminal plan or purpose to commit some crimes and has the intention to commit those crimes, but also actually foresees (or is in a position to foresee) the likely perpetration of a further crime by a member of the criminal group, and nevertheless deliberately accepts the risk of such likelihood. There is therefore here a mental element present with regard to the perpetration of the 'extra crime' (*dolus eventualis*) that is instead absent in the felony-murder or, if present, then only in the attenuated form of culpa (negligence). In the case of 'felony-murder' the agent does not figure out at all the possibility of killing a person as a result of his engaging in an unlawful action such as theft; instead in the category of ICE we are discussing the agent is aware (or at least is fully in a position to be aware) that a crime may be perpetrated by another person and deliberately omits to take action (i.e. to stop or prevent that person from perpetrating the crime, or to disassociate himself from that criminal conduct). In addition, the concept of JCE can only be relied upon on condition that the lesser culpability of the secondary offender shall be taken into account at the sentencing stage.

⁸⁹ In the first case. P., D., and a third man went to the home of a dealer in cannabis. As soon as he opened the door, one member of the group shot him and he died shortly afterwards. The defendants were charged with murder on the basis of joint enterprise. At the trial P. gave evidence and claimed that he was present at the scene only to buy cannabis. D. did not give evidence, but it was submitted on his behalf that he was unaware of the presence of the gun until it was used and that P. was responsible for the shooting. Both defendants were convicted of murder. The Court of Appeal (Criminal Division) dismissed both defendants' appeals.

In the second case, the defendant, E., aged 15 at the time of the offence, and W. were convicted of the murder of a police sergeant on the basis of joint enterprise. Both the defendant and W. had attacked the deceased with wooden posts. At the trial it was the Crown's case that the defendant was present when W. produced the knife with which the fatal injuries were inflicted. It was maintained on the defendant's behalf that there was evidence that he had fled the scene before W. produced the knife. The Court of Appeal (Criminal Division) dismissed, however, E.'s appeal.

crimes committed at the domestic level. The speeches of Lords Steyn⁹⁰ and Sutton⁹¹ are enlightening. In their view by punishing the 'secondary-offender' the law intends to convey the message that he should have opposed or impeded the crime of the 'primary offender'.

The second argument is more germane to strictly legal considerations. Generally speaking, one should not neglect an important factor: incidental criminal liability based on foresight and risk is a mode of liability that is consequential on (and incidental to) a common criminal plan; that is, an agreement by a multitude of persons to engage in illegal conduct. The 'extra crime' we are discussing is the outgrowth of previously agreed or planned criminal conduct for which each participant in the common plan is already responsible. This 'extra crime' is

⁹⁰ 16 His Lordship stated the following: 'At first glance there is substance in the third argument (of course for the Appellants] that it is anomalous that a lesser form of culpability is required in the case of a secondary party, viz. foresight of the possible commission of the greater offence, whereas in the case of the primary offender the law insists on proof of the specific intention which is an ingredient of the offence. This general argument leads, in the present case, to the particular argument that it is anomalous that the secondary party can be guilty of murder if he foresees the possibility of such a crime being committed while the primary can only be guilty if he has an intent to kill or cause really serious injury. Recklessness may suffice in the case of the secondary party but it does not in the case of the primary offender. The answer to this supposed anomaly, and other similar cases across the spectrum of criminal law, is to be found in practical and policy considerations. If the law required proof of the specific intention on the part of a secondary party, the utility of the accessory principle would be gravely undermined. It is just that a secondary party who foresees that the primary offender might kill with the intent sufficient for murder, and assists and encourages the primary offender in the criminal enterprise on this basis, should be guilty of murder. He ought to be criminal liable for harm which he foresaw and which in fact resulted from the crime he assisted and encouraged. But it would in practice almost invariably be impossible for a jury to say that the secondary party wanted death to be caused or that he regarded it as virtually certain. In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases. Moreover, the proposed change in the law must be put in context. The criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed. For these reasons I would reject the arguments advanced in favour of the revision of the accessory principle' (8).

⁹¹ My Lords, I recognise that as a matter of logic there is force in the argument advanced on behalf of appellants, and that on one view it is anomalous that the foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder in the party who actually carries out the killing, it is sufficient to constitute mens rea in a secondary party. But the rules of the common law are not based solely on logic; but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs. As Lord Salmon stated in *Reg. v. Majewski* (1977) A.C. 443, 482e, in rejecting criticism based on strict logic of a rule of the common law, "this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic". In my opinion there are practical considerations of weight and importance related to considerations of public policy which justify the principle stated in *Chan Wing-Siu* [The Queen v. Chan Wing-Siu] (1985) A.C. 168 and which prevail over considerations of strict logic' (15)

rendered possible by the prior joint planning to commit the agreed crime(s) other than the one 'incidentally' or 'additionally' perpetrated. Thus, what is at stake here is not the responsibility arising when members of a group (for instance, a military unit) engage in lawful action for example, overpowering by military force an enemy fortification) and in the course of combat one of the combatants kills a civilian or rapes a woman—a crime for which of course he alone must bear criminal responsibility. Our discussion here turns, rather, on cases where a plurality of persons agrees to perpetrate one or more crimes for which they all bear responsibility and in addition one of them commits a further crime. Here, it is plain, the additional crime is premised on the existence of a concerted criminal purpose. In other words, there exists a causal link between the concerted crime and the 'incidental' crime: the former constitutes the preliminary *sine qua non* condition and the basis of the latter (although, with regard to the latter, only the participant that evinced knowledge and risk-taking shares the liability of the other participant who perpetrated the 'additional' offence). To clarify further the nexus between the two categories of crimes at issue, it could perhaps prove useful to insist on the distinction between abstract and concrete (or specific) foreseeability, suggested above (9.4.4).⁹²

⁹² The fact that the incidental crime may be based on a nexus with the concerted crime was clearly emphasized by various courts. Suffice it to mention here the decision of the Italian Court of Cassation in *D'Ottavio and others* (decision of 12 March 1947). Two former Yugoslav war prisoners, who had escaped from a concentration camp, were suddenly surrounded by four local individuals near an Italian village. While one of them managed to flee, the other man was hit by two gunshots fired by D'Ottavio with his hunting rifle. The four aggressors then immediately left the scene. The injured man later died. The Teramo Court of Assize held that the accused had not intended to kill. With regard to the defendants other than D'Ottavio, it applied Article 116 of the Italian Criminal Code, providing that 'Where the crime committed is different from that willed by one of the participants, also that participant answers for the crime, if the fact is a consequence of his action or omission, if the crime committed is more serious than that willed, the penalty is decreased for the participant who willed the less serious offence.' On appeal, the Court of Cassation held that: 'The complaint concerning the application of Article 116 is also without merit. By virtue of this provision, where the crime committed is other than the one willed by one of the participants, also that participant is accountable for the crime if the criminal result is a consequence of his action or omission. In order for a criminal event to be held to constitute the consequence of the participant's action, it is necessary that there be a causation nexus—which is not only objective but also psychological—between the fact committed and willed by all the participants and the different fact committed by one of the participants. This is so because the participant's responsibility envisaged in Article 116 is grounded not in the notion of collective responsibility [...] but in the fundamental principle of concurrence of interdependent causes, upheld and specified in Articles 40 and 41 of the Criminal Code. By virtue of the latter principle all the participants answer for a crime both where they are the direct cause of the crime and where they are the indirect cause, in accordance with the canon *causa causae est causa causati* (the cause of a cause is also the cause of the thing caused; i.e. whoever voluntarily creates a situation bringing to, or resulting in, criminal conduct is accountable for that conduct whether or not he willed the crime). It is this concurrence of causes that also in this particular case of participation re-establishes the requirement of legal identity of the fact that is the precondition of the cooperation "in the commission of same crime". This

The third response to the objections under discussion is directed to emphasize that the basic proposition suggested here on the basis of existing case law (that any participant in a JCE is also guilty for acts by another participant, under the conditions set out in the case law) is premised on the proposition that at the sentencing stage one must, however, take into account the different degrees of culpability of the participants. The lesser form of mens rea of the 'secondary offender' shall be taken into account by meting out a lighter sentence than that inflicted on the participant who materially perpetrated the offence not envisaged in the criminal plan. Both participants are guilty, but the one who did not materially perpetrate the further crime must receive a less stiff sentence on account of his lesser culpability.

(B) Limitations of the category at issue

There exist two important qualifications to the application of the third class of JCE under discussion.

First, resorting to such class would be intrinsically ill-founded when the crime committed by the 'primary offender' requires special or specific intent (*dolus specialis*), that is, the crime charged is one of genocide, persecution, or aggression (it is common knowledge that for genocide the intent to destroy a

identity is at least generic if not specific in that all the defendants have effectively contributed to the first crime that was the cause of the second. Here lies the nexus of objective causation: all participants have directly cooperated in the crime of attempted illegal detention of persons (provided for in Article 605 of the Criminal Code) by surrounding and chasing two fugitive prisoners of war, armed with a gun and a musket for the purpose of unlawfully capturing them. This crime was the indirect cause of the subsequent and connected event consisting of the rifle shot that D'Ottavio alone fired at one of the fugitives, a rifle shot that caused a wound followed by death (see Article 584 on manslaughter). There also exists a psychological causation in that all the participants shared the conscious will to engage in an attempt to unlawfully detain a person while foreseeing a possible different crime, as can be inferred from the use of weapons: it was to anticipate that one of them might have shot at the fugitives with a view to achieving the common purpose of capturing them.'

It would seem that the Court rightly stressed the causal link between the concerted and the not-envisaged crime, by pointing to the fact that this causal link related to the objective element of the crime at issue. However, there is ultimately a link with regard to the subjective element as well. The participant in the JCE to commit a specific crime or set of crimes is put in the position to foresee the further, unconcerted crime, on account of his joining the criminal enterprise to commit the agreed upon crime. Although he did not share the intent of the participant that engaged in the further criminal conduct, he had predicted that conduct and willingly taken the risk that it might occur. There lies his culpability. He could have prevented the further crime, or disassociated himself from its likely commission. His failure to do so entails that he too must be held guilty. See also Mannetti and others.

'protected group' in whole or in part is required; persecution presupposes the intent to discriminate on one of the requisite grounds; aggression, at least in the opinion of some commentators,⁹³ is grounded in the intent to appropriate a foreign territory or to obtain economic advantages, or to interfere with the internal affairs of the victim state; see above, 7.3.3(B)). In these cases the 'secondary offender' may not share—by definition—that special intent (otherwise one would fall under the first and second class of JCE), even though entertaining such intent is a *sine qua non* condition for being charged with the crime. He may therefore not be accused of such crime under the doctrine at issue. This proposition is based on two grounds. First, on a logical impossibility: one may not be held responsible for committing a crime that requires special intent (in addition to the intent needed for the underlying crime) unless that special intent can be proved, whatever mode of responsibility for the commission of crimes is relied upon (this leaves out aiding and abetting, where it suffices to prove that the offender has made a substantial contribution to the commission of the crime by others, had knowledge of the crime, and intentionally provided assistance to its perpetration). Secondly, admittedly whoever is liable under the third category of JCE has a distinct *mens rea* from that of the 'primary offender'; nevertheless, as the 'secondary offender' bears responsibility for the same crime as the 'primary offender,' the 'distance' between the subjective element of the two offenders must not be as drastic as in the case of crimes requiring special intent. Otherwise the crucial notions of 'personal culpability' and 'causation' would be torn to shreds⁹⁴

⁹³ S. Glaser, 'Quelques remarques sur la définition de l'agression en droit international pénal' in *FPfsc/irif* fir Th. Rittler (A. nlen: Verlag Scientia, 1957), at 388-93; Idem 'Culpability en droit international pénal', in 99 *Hague Recueil* (1960-1), at 504-5.

⁹⁴ In 2004 the ICTY AC took a contrary view in *Brdanin*, with regard to genocide, [n its Decision on Interlocutory Appeal of 19 March 2004 it held that 'provided that the standard applicable to that head of liability [the third category of JCE], i.e. "reasonably foreseeable and natural consequences" is established, criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise' (§9). It went on to say that "The Trial Chamber erred by conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused' (§10). The AC thus reversed a prior decision of the TC (*Brdanin*, Decision for Acquittal Pursuant to Rule 98 bis, 28 November 2003), which had held (correctly, in my opinion) that the specific intent required for genocide 'cannot be reconciled with the *mens rea* required for a conviction pursuant to the third category of ICE. The latter consists of the Accused's awareness of the risk that genocide would be committed by other members of the JCE. This is a different *mens rea* and falls short of the threshold needed to satisfy the specific intent required for a conviction for genocide under Article 4(3)(a) (of the ICTY Statute]' (§57). In 2005, in *Kvočka and others*, the same AC limited the need for sharing the special intent to the first category of ICE. It 'affirmed' the Trial Chamber's conclusion that participants in a basic or systemic form of joint criminal enterprise must be shown to share the required

For such crimes the 'secondary offender' could only be charged— it is submitted—with aiding and abetting the main crime (needless to say, subject to the condition that the requirements of aiding or abetting the commission of one of the three classes of aforementioned crimes are met).

Let us now consider the second qualification to the application of the third class of JCE under discussion. Mature legal systems make it possible to take account of the lesser degree of culpability of the 'secondary offender' by qualifying his culpability through a charge less than that against the 'primary offender'. If the latter has engaged in murder while conducting a concerted unlawful deportation of civilians, the 'secondary offender' could be accused of manslaughter. This different charge would take into account the lesser degree of culpability of that offender. Unfortunately ICL is a rudimentary body); of law, which allows for such sophisticated distinctions or gradations only to a very limited extent. In short, one cannot charge a lesser offender with an offence belonging to a different category of international crimes; for instance, one cannot charge the 'primary offender' with murder as a crime against humanity and the 'secondary offender' with murder as a war crime. This would indeed be erroneous, for the two categories show different features; the offences at issue belong either to one category (for instance, crimes against humanity) if the requisite conditions are met (chiefly, the existence of a context of widespread or systematic practice), or to the other. Furthermore, laying different charges within the same category of international crime is logically possible only with regard to some classes of underlying offences. As classes of offences where a gradation is possible, one can mention: murder and man- slaughter (as a war crime, or a crime against humanity); willful killing (as a grave breach); and unlawful killing (as a war crime in an international armed conflict);⁹⁵ rape and sexual violence (as a war crime or a crime against humanity); and torture and inhuman or degrading treatment (as a war crime or a

intent of the principal perpetrators. Thus, for crimes of persecution, the Prosecution must demonstrate that the accused shared the common discriminatory intent of the joint criminal enterprise. If the accused does not share the discriminatory intent, then he may still be liable as an aider and abettor if he knowingly makes a substantial contribution to the crime' (§110). This proposition was taken up by an ICTR TC in *Simba* (at §388).

⁹⁵ This proposition is based on the assumption that grave breaches may only be committed in international armed conflicts, a position taken in 1995 by the ICTY AC in *Tadić* (IA), but probably no longer valid under current international customary law.

crime against humanity). For other underlying offences it would seem difficult to apply such gradations of culpability and hence of charging.

(C) Case law

The first case where this category of ICE was raised is *Tadic* (Af, 1999). According to the Prosecution the TC had erred in finding that the accused could not be charged with the killing of five men in the village of Jessica, when he participated in the attack on that village and the village of Sivci on 14 June 1992, because there was no evidence showing that he had killed or taken part in the killing of those five men. For the Prosecution 'the only conclusion reasonably open from all the evidence is that the killing of five victims was entirely predictable as part of the natural and probable consequences of the attack on the villages of Sivci and Jaskici on 14 June 1992' (§175). The Defence argued instead that the TC correctly found that 'it was a possibility that the five victims in Jaskici were killed by another, distinct group of armed men, especially as nothing [was] known as to who shot the victims or in what circumstances' (§176). As for the Prosecutions common purpose submission, the Defence contended that 'it would have to be shown that the common purpose in which the Appellant allegedly took part included killing as opposed to ethnic cleansing by other means' (§177).

The AC upheld the Prosecution's submissions after engaging in an elaborate outline of the notion of common purpose or JCE in ICL.⁹⁶ Based on this notion, the AC found that in the case at issue the defendant had taken part in a common plan to commit inhumane acts against the non-Serb civilian population in the Prijedor region in 1992. He was an armed member of the armed group that took

⁹⁶ With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category [..], personal knowledge of the system of the treatment is required (whether proved by express testimony for a matter of reasonable in view inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the members of the group and (ii) the accused willingly took that risk' (§228).

part in the attack and committed several crimes. He must have been aware 'that the actions of the group of which he was a member were likely to lead to [...] killings, but he nevertheless willingly took that risk' (§232). The AC therefore found the defendant guilty. Subsequently the TC, to which the case had been remitted for sentencing purposes, held that for the murder of the five Muslims, Tadic was simultaneously guilty of a grave breach, a war crime, and a crime against humanity. It sentenced him to 24 years' imprisonment for the grave breach and the war crime and 25 years for the crime against humanity, with the sentences to be served concurrently⁹⁷ (in its previous judgment, where the murder of the five Muslims had not been imputed to Tadic, the TC had sentenced him to 20 years' imprisonment).⁹⁸ The AC subsequently reduced the sentence to 20 years' imprisonment, both because it held the previous sentence to be excessive with regard to the relatively minor position of the accused, and because in its view 'there is in law no distinction between the seriousness of a crime against humanity and that of a war crime'. It was consequently wrong to consider the same offence as more grave if regarded as a crime against humanity than as a war crime.⁹⁹

The question of this category of criminal liability arose again in Krstic, although only tangentially, before the TC.¹⁰⁰ The essential features of the category, as set

⁹⁷ 23 ICTY, TC, Sentencing Judgment, §§15-18, 27-9 and 32 E and G.

⁹⁸ 24 ICTY, TC, Sentencing judgment.

⁹⁹ 25 ICTY, AC, §§55-8.69 and 76(3).

¹⁰⁰ As pointed out above, the Chamber held that the defendant had participated in a JCE to commit genocide. Nevertheless, the Chamber relied upon the third category of criminal enterprise with regard to some crimes committed against the persons who had escaped the massacre. It held that it was not proved that various crimes committed against Muslims fleeing Srebrenica had been agreed upon in the criminal plan. They were nevertheless to be imputed to the defendant—so held the Chamber—because they were the foreseeable consequence of the policy of forcible expulsions that was part of the criminal plan: 'The Trial Chamber not, however, convinced beyond reasonable doubt that the murders, rapes, beatings and abuses committed against the refugees at Potocari were also an agreed upon objective among the members of the joint criminal enterprise. However, there is no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign. Furthermore, given the circumstances at the time the plan was formed, General Krstic must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection. In fact, on 12 July, the VRS organised and implemented the

out in Tadic (A), 1999) were restated by the ICTY AC in Vasiljevic (§99), Kvocka and others (§83), as well as in Babic (§27). In Stakic the AC, after reversing the TCs ruling based on the notion of 'co-perpetratorship', held that the accused, in holding important positions such as President of the Crisis Staff, had participated in a JCE to commit crimes of persecution, forced displacement, and ill-treatment in detention camps against Muslims in the Prijedor area in Bosnia-Herzegovina. It then held that the accused bore criminal liability under the third category of JCE for crimes not agreed upon, namely killings in detention camps, transportation to camps of the non-Serb civilian population, and killings by the Serb armed military and police forces. The AC concluded that the accused was responsible under the third head of JCE for the crimes of murder (as a war crime and a crime against humanity) and extermination as a crime against humanity. It is notable that the Chamber insisted on the requirement of *dolus eventualis* and held, based on the findings of the TC, that this form of *mens rea* did exist in the case at issue (§§93-7).

An interesting application of the third category of JCE was made by an ICTY TC in FlagoJevic and fokic. After noting that where the objective of a JCE changes in time, a new and distinct JCE may be established, the TC pointed out that, with the establishment of such new JCE a participant in the enterprise shall not incur responsibility for criminal acts beyond the scope of the enterprise in which he had agreed to participate, but only for those acts that are 'natural and foreseeable consequences', thereby falling under the third category of JCE (§701).

Finally, it should be mentioned that the ICTY AC has placed a broad interpretation on the category of JCE at issue. In 2004 in Brdanin it held that this category of JCE can also apply when acts of genocide are committed by the 'primary offender'.¹⁰¹ In 2006, in Karemera and others the ICTR AC held that this category of criminal liability can also cover crimes committed by fellow participants 'in a vast joint criminal enterprise' where crimes committed by the

transportation of the women children and elderly outside the enclave; General Krstic was himself on the scene and exposed to firsthand knowledge that the refugees were being mistreated by VRS or other armed forces' (§616)

¹⁰¹ Brdanin, Decision on interlocutory Appeal, at §§9-10.

fellow participants are 'structurally or geographically remote from the accused':¹⁰² The same view was taken in 2007 by the ICTY AC in Brdanit with regard to the category of JCE we are discussing (AJ, §§420-5).

2.20.41 THE QUESTION OF WHETHER THE 'PHYSICAL PERPETRATOR' SHOULD ALSO BE PART OF THE JCE

As we saw above (9.4.2(B)), in Brdanin the issue was raised of the relations between members of a JCE and persons not part to the JCE who nevertheless carry out crimes in execution of the JCE (deportation and forcible transfer of Bosnian Muslim or Croat civilians). The question is as follows: do such perpetrators (henceforth physical perpetrators) need to share the joint criminal purpose for the members of the JCE to be answerable for the crimes perpetrated? The TC answered in the negative (TJ, §§344-56), while the AC in the affirmative (AJ, §§410-19, 426-32). It is therefore appropriate to dwell on the question of the relations between members of a JCE and organized groups that commit crimes in execution of a common criminal purpose.

Normally members of a JCE make up fairly small groups and are persons operating at the same level, even though in different capacities. Hence no serious problem arises: each of them is responsible for the concerted criminal actions, even if such actions are performed only by one member of the JCE. However, there may be cases where the members of the JCE constitute a larger group and form part of a hierarchically constituted organization or structure. This is typically the case for ICE II (participation in a common criminal plan within an institutional framework). Here, however, only those who knowingly make a substantial contribution to the pursuit of common criminal purposes are personally liable. Hence for all of them it is required that they be part to the JCE. The problem becomes complicated when the criminal plan is agreed upon by a number of members of a political or military group, and one of these members carries out the common criminal purpose by ordering or instigating subordinate

¹⁰² ICTR AC, Karefnera and others. Decision on Jurisdictional Appeals: Joint Criminal Enterprise, at §§11-18.

military units outside the JCE to commit some or all of the crimes envisaged in the JCE.

One should distinguish between the legal position of (a) the member of the JCE that orders or instigates outsiders to commit the crimes; and (b) that of the other members of the JCE.

To my mind the member of the JCE ordering or instigating the commission of crimes may be responsible under two distinct heads of liability. He is responsible for (1) the JCE to commit other crimes that may have been perpetrated by himself as well as other members of the JCE; and for (2) ordering and instigating the crimes perpetrated by the subordinates. These subordinates need not, of course, share the common criminal purpose (this is what occurred in *Brdanin*, according to the TC, which rightly found the defendant guilty of ordering and instigating the crime 'of deportation and forced expulsion of Bosnian Muslims and Croats, perpetrated by the army: §§359-69). If brought to trial, such subordinates are liable for the perpetration of the crime at issue.

Let us now move on to situation (b). Here the following question must be asked: does a member of the JCE other than the member that orders or instigates subordinate troops or paramilitary units or police officers (not part to the JCE) to perpetrate crimes in consonance with the criminal purposes agreed by members of the JCE, bear responsibility for the crimes perpetrated by the executioners? The answer may only be given in light of general principles of international criminal law, in particular the principle of personal criminal responsibility (indeed the judicial precedents relied upon by the AC in *Brdanin* (A) 99393-404) are not germane to the question under discussion).¹⁰³ In accordance with these

¹⁰³ They are two cases brought before US Military Tribunals sitting at Nuremberg: *Altstotter and others* (so-called *Iustice case*) and *Greifelt and others* (so-called *RL'SHA case*). As the AC admitted in *Brdanin* (AI, 6393), in neither case did the Tribunals use the expression ICE'. What matters, however, is that neither Judgment relied upon the notion of JCE. In the former, faced with crimes planned, ordered or committed by member? ur the Ministry of Justice, the Tribunal adopted traditional notions of criminal responsibility, as is apparent from the following passage: 'The defendants are not now charged with conspiracy as a separate and substantive offense, but it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of lews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency. Some of the defendants took part in the enactment of

principles the member of the JCE may only be held responsible for those crimes if (i) when concerting the crime to be perpetrated in execution of the JCE he had agreed to the physical perpetration of crimes by persons who, albeit outside the JCE, could, however, act upon the orders of one of the members of the JCE (in this case JCE I would be applicable); or (ii) he anticipated the risk that another member of the JCE might order or instigate persons outside the JCE to perpetrate crimes and willingly ran that risk (ICE III). It would not be sound to hold the member at issue liable even when the agreement (or consent) or the anticipation and deliberate taking of risk are lacking. In such case the basic precondition of liability for JCE would be lacking, and to hold the member responsible for the crimes committed by the physical perpetrator would be contrary to the principle of personal criminal responsibility.¹⁰⁴

Of course, also in the case I have just discussed the member of the JCE that ordered or instigated subordinates is responsible for ordering and instigating the crimes, although he did so in consonance with or in execution of a JCE (which in this respect would not be relevant to the establishment of guilt of the accused, whereas it might perhaps have some relevance to the setting of penalty).

laws and decrees the purpose of which was the extermination of Poles and lews in Germany and throughout Europe. Others, in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior. The overt acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged. The material facts which must be proved in any case are: (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime' (1063; emphasis added). The reason why the Tribunal did not discuss the mental state of those who executed death sentences and other criminal acts agreed upon and planned by the defendants is simply that those executioners so acted following orders by the defendants: who were hence responsible not for ICE to commit persecution but for ordering persecution. Similarly in Greifelt and others the Tribunal convicted the defendants of ordering and instigating the kidnapping of children of foreign nationals, taking away foreign infants, executing in concentration camps foreigners and so on. As the Tribunal put it: '[i]t is no defense for a defendant to insist, for instance, that he never evacuated populations when orders exist, signed by him, in which he directed that the evacuation should take place. While in such a case the defendant might not have actually carried out the physical evacuation in the sense that he did not personally evacuate the population, he nevertheless is responsible for the action, and his participation by instigating the action is more pronounced than that of those who actually performed the deed' (153).

¹⁰⁴ For a similar view, see the Partly Dissenting opinion of fudge Shahabuddeen in Brdanin (AJ) (§§4 The contrary view is advanced by ludge Meron in his Separate Opinion in the same case (513-8)

2.20.42 THE DIFFERENCE BETWEEN ICE AND AIDING AND ABETTING

It has been objected that the doctrine of JCE does not clearly distinguish between the responsibility of a participant in JCE and that of an aider and abettor. Moreover, that doctrine would even go so far as to foist a greater weight upon a person responsible for aiding and abetting than on a participant in a JCE. In fact a major difference between the two categories of persons does exist. It lies in their respective mens rea (as for actus reus, in both cases a 'substantial' contribution is required, as I shall point out below with regard to JCE). The participant in a JCE (i) takes part in a common criminal plan or purpose and shares a common intent to perpetrate a crime (murder, forced expulsion, persecution, and so on); or (ii) by willingly and knowingly participating in an institutional criminal framework, expressly or implicitly evinces his sharing the criminal conduct in which that institutional framework engages; or else (iii) in addition to adhering to a criminal plan and sharing the intent to commit a crime, willingly runs the risk that another participant may intentionally perpetrate a further crime that the former had foreseen.

In contrast, as we shall see when discussing aiding and abetting (see *infra*, 10.1), he who aids and abets does not share, either at the outset or later, the criminal intent of the perpetrator, although he is cognizant that the perpetrator intends to commit a crime; the aider and abettor only intends to assist the perpetrator in the commission of a crime. This is why, in principle, the criminal liability of the aider and abettor is more tenuous (or less weighty) than that of a participant in a common criminal enterprise. As the ICTY AC put it in a number of cases, aiding and abetting 'generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise'.¹⁰⁵

It should be added that, according to ICTY case law, it would be wrong to speak of 'aiding and abetting a JCE', for whenever a person intends to assist in the

¹⁰⁵ Krnojelac (Af, §75), Vasiljevic (A), §102), Kvotka and others (A), §92).

commission of crimes by a group of persons involved in a JCE, that person should more correctly be held liable for participation in the JCE.¹⁰⁶

2.20.43 TO WHAT EXTENT CAN THE ICC RELY UPON THE DOCTRINE OF JCE?

The ICC Statute does not contain a provision that regulates JCE in detail as a mode of responsibility. That such form of criminal liability is implicitly permitted under the Statute can however be inferred from Article 25(1),¹⁰⁷ which generically states that criminal responsibility for any of the crimes covered by the Statute is incurred by anybody 'committing a crime' 'jointly with another person'. This provision, in addition to co-perpetration (the same crime is committed by a plurality of persons, who perform the same criminal act; see above, 9.3), also covers JCE. However, the ICC Statute goes further, for, although in envisaging a different mode of liability (outsider's contribution to a JCE; see below), it explicitly refers to the 'commission or attempted commission of such a crime [within the jurisdiction of the Court] by a group of persons acting with a common purpose' (Article 25(3)(d)).

¹⁰⁶ ICTY AC, Milutinović and others. Decision on Dragoliub Ojdanović's Motion Challenging Jurisdiction of the Trial Chamber II, §20; Kvodka and others (AJ, §91).

¹⁰⁷ This provision stipulates that:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime' (emphasis added)

As for the mens rea required for ICE under the Statute, one can refer to the general provision of Article 30 (on the mental element of the crimes covered by the Statute), which requires 'intent or knowledge'. Should one hold the view that consequently the Statute of the ICC always requires intent as the necessary subjective element necessary for a finding of criminal liability, whatever the mode of responsibility, it would follow that the ICC, while generally empowered to rely upon the doctrine of JCE, would be barred from applying the third category referred to above.¹⁰⁸

However, Article 30, before setting out the two mental elements of intent or knowledge, contains a general clause ('unless otherwise provided') that leaves other subjective frames of mind unaffected, so long as they are provided for or required by other provisions of the Statute or by customary international law.¹⁰⁹ Hence the contention can be made that *dolus eventualis* or recklessness for the third form of the JCE is not excluded by the ICC Statute.

This interpretation would be justified by the need to punish criminal conduct that otherwise would not be regarded as culpable. In addition, it would not be contrary to the principle of personal culpability, for in any case the person at issue (i) would be guilty of intentionally participating in a criminal purpose or plan; (ii) his mens rea concerning the additional, not previously concerted crime, would have to be proved by the Prosecution; and (iii) his lesser culpability would have to be taken into account at the sentencing stage.

It should be added that, contrary to what various authors, including the present one, have either implicitly or expressly contended,¹¹⁰ the gist of Article 25(3)(d) is the regulation not of JCE but rather of a different mode of responsibility. This

¹⁰⁸ It would seem that this is the view taken by the ICC Pre-Trial Chamber in Lubanga (§§322-67).

¹⁰⁹ See G. Werle and F. Jessberger, 'Unless Otherwise Provided' in 3 IICf (2005), ssds.

¹¹⁰ For instance see W.A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed (Cambridge: Cambridge University Press, 2007), at 211-13; K. Ambos, *Joint Criminal Enterprise a Command Responsibility** in 5//C/(2007), 172-3; A. Cassese, *'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise'*, *ibidem*, at 132. See also the ICTY A; in Tadić (1999, at §222). On Article 25(3)(d) see also K. Ambos in O. Triffterer (ed), *Commentary*, at 483-6 as well A. Eser, Cassese, Gaeta, Fones (eds), *The Rome Statute*, 1,802-3.

consists in the fact that a person outside the criminal group committing (or attempting to commit) a crime contributes to the perpetration of such crime without being a member to the criminal group. It would seem that such contribution is different from aiding and abetting. Indeed, the aider and abettor intends to assist in the commission of a crime by others but do not share the criminal intent of the perpetrator (see 10.1 and 9.4.6). Here, instead, the 'outside contributor' either (a) intends to further the criminal action (hence is aware of and shares the criminal intent of the group), or (b) simply knows, that is, is aware of, the criminal intent of the group. In the former instance, the 'outside contributor', by sharing the criminal intent of the group only distinguishes himself from members of the JCE in that he is not part of the criminal agreement (neither at the moment when such agreement is made nor later). In the latter instance that is in the category (b) the 'outside contributor' distinguishes himself from the aider and abettor only in that he aides and abets a whole criminal group (that is, a multiplicity of persons) and not a single perpetrator. Otherwise, there is no distinction between the two classes of persons assisting in the commission of crimes by others.

Probably the inclusion of this new mode of liability is justified by its origin, namely the fact that the provision was taken up from Article 2(3) of the 1997 International Convention on the Suppression of Terrorist Bombing. The needs of the fight against widespread and increasingly dangerous terrorist criminality warranted the expansion of responsibility to these forms of 'external assistance'. The ICC Statute rather uncritically restated that provision of the Terrorist Bombing Convention.¹¹¹

2.20.44 OTHER MODES OF LIABILITY

¹¹¹ The category of 'outsider contributor' to ICE is in some respects not dissimilar from the category 'external participation in mafia crimes' (*concorso esterno in associazione mafiosa*), set forth by Italian courts (see P. L. Vigna, 'Fighting organized Crime, with particular reference to Mafia Crimes in Italy, in 4 /J (2006), 526-7; according to this author the criminal offence at issue covers cases where a person, although not a part and parcel of the structure of a criminal organization and free from any link of subjection to the association, nevertheless provides the association with a contribution which is specific, conscious and voluntary. Such contribution must however be causally relevant to the strengthening of the criminal association and aimed at the implementation (albeit partial) of the criminal plan.' (ibidem).

AIDING AND ABETTING

A person may participate in a crime without sharing the criminal intent of the principal perpetrator, but simply by assisting him in the commission of a crime. In aiding and abetting the objective element is constituted by practical assistance, encouragement, or moral support, by the accessory to the principal (namely the author of the main crime); in addition, such assistance, support, etc. must have a substantial effect on the perpetration of the crime.

Thus, unlike some instances that we will consider *infra* (see, for instance, 10.2), aiding and abetting does not necessarily presuppose that the aider and abettor shares a common plan or purpose with the principal or his criminal intent or other form of *mens rea*; as stated by the ICTY AC in *Tadic*, 'the principal may not even know about the accomplices contribution' (§229). What is required is that the person supporting or assisting in the crime be aware that his action helps the perpetrator in the commission of the crime, and intend to encourage such commission (on this subjective element, see further below).

The substantial assistance required for aiding and abetting may be provided in the form of positive action or omission before, during or after perpetration of the crime (see e.g. *Aleksovski*, AJ, §62; *Blaskic*, AJ, §48). Furthermore, the assistance may be physical (or tangible) or moral and psychological (*Furundijja*, TJ, §231). An example of intangible assistance was given by the Advocate General in *Schonfeld and others*. The defendants had been charged with being 'concerned in the killing' of three Allied airmen who had been hiding in the home of a member of the Dutch resistance. In outlining the role of accessories not present at the scene of a crime, the Advocate General gave the following example:

if he [the accessory] watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the

knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting (70).

An interesting legal issue is whether mere presence at the commission of a crime may involve aiding and abetting such crime. The case law has rightly set out the notion that mere presence may only imply aiding and abetting when such presence involves substantial encouragement to the crime on account of the authority of the onlooker, with the consequence that the perpetrator draws moral and psychological support or a legitimizing effect from that presence (if, for instance, such person is a superior to the perpetrator, or has an important status in society or in the military hierarchy). As an example of an 'approving spectator' whose mere presence involved his aiding and abetting a crime, one can mention the Synagogue case (case against K. and A, at 56), decided in 1948, under the terms of Control Council Law No. 10, by the German Supreme Court in the British Occupied Zone. One of the defendants accused was found guilty of a crime against humanity (the devastation of a synagogue in 1938 in Germany), although he had not physically taken part in it, nor planned or ordered it. The court of first instance and then the Supreme Court held that his intermittent presence on the crime scene, together with his status as a long-time militant of the Nazi party, as well as his knowledge of the criminal enterprise, were sufficient to convict him. Instead, as an example of presence not involving any liability for aiding and abetting, mention can be made of the Pig-cart parade case (L. and others case), also from the German Supreme Court in the British Occupied Zone. The defendant P. had attended, as a spectator in civilian dress, a 'parade' of Nazi 'assault troops' in which two political opponents of the Nazi party were exposed to public humiliation. P. had followed the 'parade' without taking any active part. According to the court (pronouncing in 1948), P.'s conduct could not 'even with certainty be evaluated as objective or subjective approval. Furthermore, silent approval that does not contribute to causing the offence in no way meets the requirements for criminal liability' (234). Hence he was acquitted.¹¹²

¹¹² See also Furundijia, t], §203. The ICTY AC held in Brdanin that 'an accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement

The subjective element of aiding and abetting resides in the accessory having knowledge that 'his actions assist the perpetrator in the commission of the crime'.¹¹³ Thus, this subjective element consists of two requirements:

(i) awareness that the principal will be using, is using, or has used the assistance for the purpose of engaging in criminal conduct. It is not required that the accessory be fully cognizant of the specificities of the crime that will be, is being, or has been committed by the perpetrator, let alone of the specific criminal intent of the perpetrator. The aider and abettor is required to be aware either of the criminal intent of the perpetrator or at least of the risk for the perpetrator to engage in criminal conduct.¹¹⁴ In other words, it may suffice for the accomplice to entertain recklessness (*dolus eventualis*) with regard to the behaviour of the principal. As an SCSL TC put it in *Brima and others*, the mens rea required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator (§776).

This seems to correspond to fundamental principles of criminal law: if I lend a gun to a well-known thug, already convicted of burglary or armed robbery,

of the crime and that such conduct substantially contributed to the crime. This form of aiding and abetting is not, strictly speaking, criminal responsibility for omission. In the cases where this category was applied, the accused had a position of authority, he was physically present on the scene of the crime, and his non-intervention was seen as tacit approval and encouragement' (AJ, §273). See also ICTR, *Kayishema and Ruzindana*, TI, §200-3, and AI, §§201-2.

¹¹³ This, with convincing arguments, an ICTY TC held in *Furundija* Tf, §§190-249. See also *Aleksovski* TJ, §63; *Kunarac and others* TI, §391; *Vasiljevic*, TI, §70; *Kvoika*, TI, §254; *Delalic*, AI, §352; *Tadic* AI, §229; *Blaskic* AI, §46; *Krnjelac*, AI, §52; see also, *Akayesu* TI, §484; *Kayishema and Ruzindana*, TI, §§203-7; *Musema* (§126), *Ntakirutimana*, TI, §787; *Kajelijeli*, TI, §763; *Kamuhanda*, TI, §597.

In the ICC Statute aiding and abetting is envisaged in Article 25(3)(c), whereby a person is responsible if for the purpose of facilitating the commission of such a crime [i.e. a crime within the jurisdiction of the Court], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'.

¹¹⁴ In *Furundija* an ICTY Trial Chamber held that 'it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor' (Tf, 9247). Another Trial Chamber supported this proposition in *Blaskic* (TI, §757), and the Appeals Chamber concurred in it in its judgment in *Blaskic* (A), §50.

without knowing what specific crime he intends to perpetrate but in the knowledge that he will use it to engage in criminal conduct, I am answerable for aiding and abetting whatever crime he may later have committed by using that weapon (murder, armed robbery, serious bodily harm, etc.); it is not necessary for me to be fully aware of the specific crime he intends to perpetrate and the required mental element of that crime;¹¹⁵ (ii) furthermore the aider and abettor must willingly aim to help or encourage another person in the commission of a crime; in this respect intent is therefore required.

Among the various cases where the notion was applied,¹¹⁶ Akayesu can be cited, not so much for outlining the legal contours of the notion (the TC at one point

¹¹⁵ The issue arose in van Anraat before the Hague Court of Appeal. The Court was faced with a case of aiding and abetting. The accused had provided to Iraq, between 1980 and 1988, the chemical raw material TDG (Thiodiglycid) necessary for the manufacture of the mustard gas that the Iraqi Government had then used against the Kurds in 1987-8. The Court discussed whether, faced with this case of aiding and abetting a war crime, it was to apply Article 48 of the Dutch Criminal Code, on complicity as an accessory, or rather ICL. The Court held appropriate to apply Dutch law, which in its view was clearer on the matter. Dutch law does not require that the assistance provided by the accessory be indispensable or make a 'causal contribution' to the main offence; it simply requires that 'the assistance offered by the accessory [should] promote the offence or [make] it easier to commit that offence' (§12.4).

The Court first found that the accused knew that the chemicals he provided would be used to produce mustard gas ('The fact that TDG, in the quantities as supplied by the defendant—more than eleven hundred (1,100) tons altogether—could only serve for the production of mustard gas and not—as continuously argued by the defendant and his defence—for use in the textile industry, has been stated by expert witness [A], among others, during the court session of 4 April 2006. [A] confirmed his earlier statement of 30 May 2006 before the examining magistrate in which he said that it is totally unthinkable that during the 1980s TDG was used in Iraq as textile 'additive' and that in Iraq not one factory had been found that was equipped for the production of textile paint or printing ink. Also witness (head of the Iraqi team that set up the FFCD), who was in charge of quality control of mustard gas and who was head of the team that set up the already mentioned Full Final and Complete Disclosure (FFCD) stated mid-2005 before the examining magistrate: If one speaks about tons of TDG, then there is only one possible application: mustard gas' §11.10).

The Court then found that the accused was aware of the high risk of use of the mustard gas in war ('From the defendant's awareness of the fact that his supplies of TDG served for the production of mustard gas in a country that was involved in a long lasting war with a neighbouring country and of the efforts to conceal the supplies of a precursor of that gas and the production of the poison gas itself, follows defendant's awareness that the mustard gas was going to be used by Iraq in the war [...]. Through his conscious contribution to the production of mustard gas in a country at war, the defendant knew under those circumstances that he was. The one who supplied the material and created the occasion for the actual use of that gas, in the sense that he was very aware of the fact that in the given circumstances the use of this gas could not and would not fail to materialise. In different words: the defendant was very aware of the fact that—in the ordinary course of events—the gas was going to be used. In this respect the Court assumes that the defendant, notwithstanding his statements concerning his relevant knowledge, was aware of the—also then known—unscrupulous character of the then Iraqi regime' §11.16; emphasis added).

¹¹⁶ Such cases include Schonfeld and Rohde, both heard by British military courts (at 64 and 56, respectively), Zyklon B, also heard by a British court (at 93), Einsatzgruppen, brought before by a US Military Tribunal sitting at Nuremberg (at 569-85), S. and others (Hechingen Deportation case), brought before a German court in the French Occupied Zone (at 484-90). However, in most of these cases the

stated that 'complicity' was to be defined in the light of the Rwandan Penal Code: §537), as for the legal findings on this matter. The TC found that

Akayesu, in his capacity as bourgmestre [mayor], was responsible for maintaining law and public order in the commune of Taba and (...) had the effective authority over the communal police. Moreover, as leader' of Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted before the Chamber that he had the power to assemble the population and that they obeyed his instructions. It has also been proved that a very large number of Tutsi were killed in Taba between 7 April and the end of June 1994, while Akayesu was bourgmestre of the Commune. Knowing of such killings, he opposed them and attempted to prevent them only until 18 April 1994, after which date he not only stopped trying to maintain law and order in his commune, but was also present during the acts of violence and killings, and sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi [...] The Chamber holds that the fact that Akayesu, as a local authority, failed to oppose such killings and serious bodily or mental harm constituted a form of tacit encouragement, which was compounded by being present [during] such criminal acts (§§704-5).

The Chamber added that Akayesu was present during numerous incidents of rape and sexual violence against Tutsi women and, by his attitude and utterances, encouraged such acts, thus giving 'tacit encouragement' to the rapes being committed. The Court concluded that he was criminally responsible 'for having abetted in the preparation or execution of the killings of members of the

notion of aiding and abetting was not clearly defined as distinct from that of 'participation in a common purpose'.

TCs of the ICTR and the ICTY have made a better jurisprudential contribution to the outlining and enunciation of the concept in Akayesu (dealing with the notion of 'complicity in genocide': §§525-48), in Tadić (§§688-92), and in Furundžija (§§190-249).

One may also mention a Canadian case involving torture: in Moreno (decision of 14 September 1993) the Court held that 'Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement [...] While mere presence at the scene of a crime (torture) is not sufficient to invoke the exclusion clause [of the Refugee Convention], the act of keeping watch with a view to preventing the intended victim from escaping may well attract criminal liability' (at 16-17). See also Ramirez (at 5-9).

Tutsi group and the infliction of serious bodily and mental harm on members of the said group' (§§706-7).

In *Furundzija* an ICTY TC found that the accused, an officer of the Bosnian Croat armed forces, was present while the victim was being raped by another officer, and interrogated her. It held that in this way he had given assistance, encouragement, or moral support, having a substantial effect on the crime by the other officer, with the knowledge that these acts assisted the commission of the offence. The TC therefore found the defendant guilty of aiding and abetting outrages upon personal dignity, including rape (§§270-5).¹¹⁷

2.20.45 INCITEMENT AS A FORM OF PARTICIPATION IN INTERNATIONAL CRIMES

Incitement to commit a crime is some form of instigation, inducement, encouragement, or persuasion to perpetrate the crime. Incitement does not necessarily presuppose a hierarchical position. It simply means taking all those psychological or physical steps designed to prompt somebody else to commit a crime. It also requires the intent to have the crime perpetrated.

Both positive acts and omissions may constitute incitement.¹¹⁸ Furthermore, incitement is a crime only under certain conditions: (i) it must be direct and explicit, (ii) commission of the crime by other persons must follow up. In other words, incitement is not punished per se, but only if it leads to the perpetration of a crime (as we shall see, at i0.8, ICL provides for an exception to this rule, in the case of genocide). Thus, a causal connection is necessary between the instigation and the criminal conduct of the persons that committed the crime.¹¹⁹

¹¹⁷ In *Aleksovski* the TC found that the defendant 'By being present during the mistreatment, and yet not objecting to it notwithstanding its systematic nature and the authority he had over its perpetrators, the accused was necessarily aware that such tacit approval would be construed as a sign of his support and encouragement. He thus contributed substantially to the mistreatment. Accordingly, the accused must be held responsible for aiding and abetting under Article 7(1) in the physical and mental abuse which detainees were subjected to during the body searches on 15 and 16 April 1993' (§87).

¹¹⁸ *Blaikic* 17, *WO Kordic and Cerkez*, TJ, §387.

¹¹⁹ See *Blaskic*,. 17, §280; *Kordic and Cerkez* TI, §387; *Kvaika*, TJ, 9252; *Akayesu*. I-I, §482; *Semanza*, f], §381; *Rutaganda*. T), §38; *Musema*, Tf, §120, *Kajelijdi*, T:, 762; *Kamuhanda*, TI, §593.

The requisite subjective element may be set out as follows: (i) the person intended to induce the commission of the crime by another person, or in other words 'directly intended to provoke the commission of the crime';¹²⁰ or (ii) the person was at least aware of the likelihood that commission of the crime would be a consequence of his action; in addition, (iii) the person must possess the mens rea concerning the crime he is instigating.¹²¹

In Kurt Mayer, tried by a Canadian Military Court sitting at Aurich in Germany, the accused, a Commander of the 25 SS Panzer Grenadier Regiment, was among other things, charged with having incited and counseled troops under his command to deny quarter to Allied troops in 1943-4 in Belgium and France. The Judge Advocate stated As it is an offence to deny quarter to prisoners I think an officer may be convicted of a war crime if he incites and counsels troops under his command to deny quarter, whether or not prisoners were killed as a result thereof. It would seem to be common sense to say that not only those members of the enemy who unlawfully kill prisoners may be charged as war criminals, but also any superior military commander who incites and counsels his troops to commit such offences (At 840).¹²²

2.20.46 INCHOATE CRIMES: GENERAL

Many legal systems punish not only consummated criminal offences (for instance murder, theft, etc.), but also 'inchoate', that is preliminary or 'just begun' criminal wrongdoings. These are acts that: (i) are preparatory to prohibited offences; (ii) have not been completed, therefore have not yet caused any harm, and (iii) are punished on their own-, that is, in spite of the fact that they have not led to a completed offence.

¹²⁰ BlaskU, TL §278; Kordic and Cerkez, T; §387; Bagilishema. "[], §31.

¹²¹ Kvočka, TI, §252; Naletilic and Martinovic, T), §60

¹²² Cases where incitement to commit war crimes was punished include Falkenhorst (at 23 and 29-30).

The rationale behind criminalization of such offences is clear: the legal system intends to protect society as far as possible; therefore, in addition to punishing offence' already perpetrated, it endeavors to prevent the commission of potential transgressions. It consequently intervenes with its prohibitions at an early stage, before crime: are completed; that is, at the stage to their preparation, so as to forestall the consummation of the harmful consequences of actual crimes.

In many national legal systems (particularly in common law countries) three categories of such crimes are envisaged: attempt, conspiracy, and incitement. In international law, while attempt is regarded as admissible as a general class of inchoate crimes, conspiracy and incitement are only prohibited as 'preliminary' (not consummated) offences when connected to the most serious crime, genocide. In addition, ICI also punishes planning or ordering the commission of international crimes.

The very limited acceptance of conspiracy is probably due to the fact that this class of criminal offence is not accepted in most civil law countries; hence it has been considered admissible at the international level only with regard to the most heinous and dangerous international crime, genocide, which aims at destroying groups as such.

As for incitement, as we have seen above (10.2), in ICL it is prohibited only if it leads to the actual perpetration of the crime; that is, as a form of participation in crime, probably because states and courts have felt that prohibiting incitement per se in connection with any international crime, including war crimes and crimes against humanity would excessively broaden the range of criminal conduct, the more so because of the difficulty of clearly delineating the notion of incitement. Incitement as such has been exceptionally prohibited, subject, however, to some stringent conditions, in connection with genocide.

As for planning and ordering, the rationale behind the tendency of international law to punish them as inchoate crimes lies primarily in this: the most serious and large-scale international crimes result from careful preparation and concerted action by many agents, or are the result of instructions and directives issued by

military or political leaders. In consequence international criminal rules aim to prevent or at least circumscribe such conduct by stigmatizing it as criminal and making it punishable.

In summary, in ICL, within the general category of inchoate crimes one ought to distinguish three subcategories:

1. Criminal conduct that is preparatory to a crime, but which by definition cannot be followed by the intended crime. This subcategory encompasses attempt, where, by definition, the subsequent offence is not consummated (because subjective or external circumstances prevent consummation).

2. Criminal conduct that is preparatory to crimes proper, and is punished per se; that is, even if it does not lead to the actual perpetration of the crime. However, when this perpetration follows, the preparatory conduct is no longer punishable as such, as it is 'absorbed' into the actual crime (although it may nevertheless be taken into account as an aggravating circumstance) if the author of the preliminary offence also is the perpetrator of the actual crime. If, however, the two classes of agent differ, one agent will be responsible for the inchoate crime, the other for the execution of the crime proper. This Sub category embraces planning as well as conspiracy to wage aggression.

3. Criminal conduct that is punished per se, whether or not it is followed by the consummation of a crime; where a crime does follow, this conduct as well as the consummated crime is punished. This subcategory includes incitement to commit genocide, conspiracy to commit genocide, as well as ordering (which, if the order is executed, involves the responsibility of the superior for ordering criminal conduct, while the subordinate is liable for the execution of the unlawful order).

2.20.47 ATTEMPT

Attempt as a distinct criminal offence occurs whenever a person intending to commit a crime tries to carry it out without, however, the normal outcome of his action coming about.

One should distinguish between two different possibilities: (i) the perpetrator takes the initial steps but is then stopped by others; or (ii) on account of circumstances independent of his will, his action does not produce the effects he intended to bring about; in other words, he performs all the necessary acts without, however, the intended result following. An example of the first category is when a soldier starts to beat a prisoner of war savagely with the intention of killing him, and is only prevented from so doing by others, who drag him off his intended victim; or, within a general context of massive attacks against civilians, a military officer orders his troops to blow up an internment camp where male civilians belonging to a particular ethnic group are being held; however, the sudden and unexpected arrival of a superior officer who is contrary to such acts of extermination at the last minute prevents the troops from lighting the fuse of the dynamite. An example of the second category is when a soldier shoots at a 'prisoner of war, intending to execute him, but the intended victim is not fatally wounded and subsequently manages to escape. Another example is when a military unit, following orders of an officer, launches a missile against a group of civilian dwellings; the missile launcher, however, gets jammed and the missile is not fired, or else the launcher misfires and the missile ends up in a nearby lake, where it does not cause any victims or material damage. Yet another example is when an order for the deportation of civilians is executed, within the context of a systematic attack on civilians, and all civilians detained in a camp are put on buses to be deported; however, an air attack by the enemy belligerent prevents the buses from leaving and all the detainees, taking advantage of the ensuing turmoil, manage to escape. A further example is the case where the victim of an attempted murder is already dead (without, of course, the agent knowing this circumstance).¹²³

¹²³ In *Charles W. Keenan* the accused had been ordered by his superior to 'finish off' a civilian woman at whom the superior had already shot. A US Court of Military Appeal held that in the case at issue attempted murder was to be ruled out only because the subordinate knew that she was no longer alive when he fired at her (at 114). The Court stated that 'so far as attempted murder is concerned, military law "has tended

Although in the category of attempt the intended harm is not caused to the victim, international law nevertheless makes attempt punishable, in order to prevent breaches of international rules as far as possible. Consistently, this offence is punished in various national laws on war crimes,¹²⁴ or is regarded as a distinct offence in national case law on the same crimes.¹²⁵

Some international tribunals have denied that either customary rules or the tribunal's Statute contemplated attempt as a general category (Akayesu, TJ, §473; Krnojelac, TJ, §432 nt. 1292).¹²⁶ Probably this wrong conclusion is due partly to the fact that attempt as an inchoate offence rarely occurs in the case of crimes against humanity (while it is expressly prohibited for genocide), partly to the fact that where attempted crimes were committed, prosecutors, followed by international tribunals, misapprehended such offences and, instead of charging the defendant with attempted war crimes or crimes against humanity, wrongly charged him with other offences. A case in point is Vasiljevic. The offender, a Bosnian Serb member of a paramilitary group, together with three other persons, had allegedly taken Serbian Bosnian Muslim civilians to the bank of the river

toward the advanced and modern position" that holds one accountable for conduct which would constitute a crime if the facts were as he believed them to be (see *United States v. Thomas*). Here the accused expressly testified that he believed the woman was dead; and the board of review specifically refused to find that she was still alive when the accused fired at her. Moore and Eakins also testified that they believed the victim was dead before the accused fired. The board of review could, therefore, reasonably conclude that the accused knew he was firing at a corpse. This conclusion necessarily absolves him of attempted murder' (at 113).

To support its ruling the Court cited an important case, unrelated to war crimes, where the same Court had extensively dealt with the notion at issue: *Rodger D. Thomas*, a case of attempted rape, which had offered the Court the opportunity to discuss the requisite ingredients of the offence, with a reasoning that is along the same lines as the notion propounded above for international criminal law (at 287-92). The Court held that the elements of the offence of attempted rape were: '(i) an overt act; (2) specific intent; (3) more than mere preparation; (4) tending to effect the commission of the offence; and (5) failure to effect its commission' (at 286).

¹²⁴ See, for instance, the laws cited in UN Law Reports, vol. XV, at 89 (Norway, Yugoslavia, the Netherlands).

¹²⁵ See the cases reported in UN Law Reports, vol. VI, 120, as well as in UN Law Reports, vol. VII, at 73.

¹²⁶ The TC stated that 'The existence of a mistaken belief that the intended victim will be discriminated against, together with an intention to discriminate against that person because of that mistaken belief, may in some circumstances amount to the inchoate offence of attempted persecution, but no such crime falls within the jurisdiction of this Tribunal' (§242 n. 1292).

Drina, forced them to line up and then opened fire to kill all of them. Five men died, while two, pretending to be shot dead, jumped into the river and saved their life. The Prosecution charged the defendant with murder (as a war crime and a crime against humanity) for the killing of the five Muslims, while, for the attempted murder, it charged them with inhumane acts as a crime against humanity and violence to life and persons as a war crime. The TC in the event convicted the defendant of 'other inhumane acts' as a crime against humanity.¹²⁷ The AC did not reverse the decision on this specific issue. However, in another case where the prosecutor had charged the defendant with murder as well as, for 12 attempted murders, 'inhuman acts' (Mrdja, Indictment, at 4), the TC rightly spoke of 'attempted murder' in its sentencing judgment (§31).

The existence of a customary rule on attempt can be inferred, more than from the fact that all penal systems of the world provide for attempt as a separate mode of criminal liability, from the existence of numerous cases where national courts have relied upon the notion of attempt (normally attempted murder) in connection with war crimes. In this respect one can cite numerous cases brought before German courts, where the question revolved around the attempted killing of prisoners of war, civilians or inmates in concentration camps;¹²⁸ Canadian courts (for instance in *of hand Neitz*, at 209, where the question at issue was the attempted murder of a prisoner of war),¹²⁹ as well as US courts (for instance, in

¹²⁷ On the decision, see the critical remarks of A. Cassese in 2 //C/ (2004), 265-74

¹²⁸ See, for instance, Friedrich Otto Kohler, at 274 (the defendant was a police officer charged with killing German and foreign detainees in 1945); Kurt KSilner, at 682 (the accused, a member of the SS and head of the security police, had committed war crimes in 1942 against persons detained in a concentration camp in Poland); Otto Haupt and others, at 604 (the defendants had committed war crimes against prisoners of war detained in a concentration camp); Karl Dietrich, at 485 (the issue was that of ill-treatment of Jews in occupied territory; the Court of Assize ruled out attempted murder on the facts). Some cases concern aiding and abetting attempted murder: see, for instance, W. I. F. Kleinhenn at, at 9 (in 1942 the accused had committed war crimes against sick detainees in a concentration camp). Other cases concern attempted manslaughter: see for instance S. case, at 505 (in early 1945 the defendant had committed war crimes against foreign workers).

¹²⁹ The accused Johann Neitz, a German soldier, had shot twice at a member of the Royal Canadian Air Force, who had been taken prisoner after his aircraft had been struck by flak. As a result of the shooting the Canadian prisoner fell down but did not die. Neitz was charged both with committing a war crime, in that he had fired, with intent to kill, two shots at the Canadian prisoner, and, alternatively, with a war crime in that he had wounded the prisoner of war, in violation of the laws and usages of war (see the Prosecutors opening address, at 13, and the Judge Advocate's summing-up, at 195-205). The Court found Neitz guilty of the first charge and sentenced him to be imprisoned for life (see *ibid.*, 209).

Charles W. Keenn, at 114).¹³⁰ In these cases national courts made allowance for the war crime of attempted murder (or manslaughter).¹³¹

¹³⁰ The L'S Court of Military Appeals allowed for the war crime of attempted murder, although it held that in the case at issue the accused was not guilty of such crime, the facts were as follows. In 1966 a ten-man squad of L'S servicemen entered a village in Vietnam where they suspected Vietcongs were hiding or were being protected. One of them, corporal Luczko, shot twice at an unarmed woman; the accused, private Keenan, asked the corporal whether he wanted him, Keenan, to finish her off. The corporal did not answer, but fired a third shot at the woman. After that he asked Keenan to finish her off, and Keenan fired an automatic burst. The Board of Review indicated that 'it was not convinced beyond a reasonable doubt that the victim was alive at the time the accused fired at her' (113). On the basis of what finding 'it absolved the accused of all criminal responsibility in the death of the woman. Appellate Government counsel contended that the Board of Reviews finding of fact did not automatically render the evidence insufficient to affirm a finding of guilt' among other things on the ground that he (the accused) committed the lesser included offense of attempted murder' (113). The Court of Military Appeals held, however, otherwise, it stated that 'so far as attempted murder is concerned, military law 'has tended toward the advanced and modern position' that holds one accountable for conduct which would constitute a crime if the facts were as he believed them to be [...] Here the accused testified that he believed the woman was dead; and the board of review specifically refused to find that she was alive when the accused fired at her. Moore and Eakins 'two members of the squad' testified that they believed the victim was dead before the accused fired. The Board of Review could, therefore, reasonably conclude that the accused knew he was firing at a corpse. This conclusion necessarily absolves him of attempted murder' (113).

¹³¹ In contrast, some post-Second World War German courts pronouncing on cases of denunciation as a crime against humanity held that attempt is conceptually not admissible in relation to such category of crimes. It is not clear whether the rather convoluted propositions of those courts may be construed as indicating that such courts only referred to denunciation to the Gestapo (of Jews or political opponents or at any rate persons contrary to the Nazi system) as crimes against humanity (that is, as 'assaults on victims connected with the Nazi rule based on violence and tyranny'). See P. case, at 15; V. case, at 21 and O case, at 391-2.

It would seem that this exclusion of attempt is primarily due to the upholding by these German courts of a very broad notion of crimes against humanity, a notion that also includes as part of the objective element of the crime the 'attempt to cause damage'. In this connection the first decision on the matter, namely the aforementioned case P. is significant, although the Court's reasoning is rather convoluted. The facts were as follows: in 1933 the accused, a member of the SA (Sturmabteilungen) passed by the veranda of a young man who was whistling the International while shining shoes. The accused considered that he was being provoked by the song and, after trying unsuccessfully to get into the house, returned some time later with a police van. Having entered the house, he pushed himself forward between the police officials and punched the young man in the face and kicked him in the legs. The police came to the aid of the young man by holding the accused away from him, then arrested the young man and took him away to the police prison instead of the SA barracks, as requested by the accused. A few days later the young man was released from police custody. The court of first instance sentenced the accused to two months' imprisonment for a crime against humanity pursuant to Control Council Law no. 10. The Supreme Court held that the crime of persecution has a 'relationship to violence and arbitrary rule, as was the case of the Nazi time with the persecution programme, as one of its core elements' (14j. 'A connection must be established between the assault on the victim and the system of violent and arbitrary rule prevailing' (14J. A harm or injury to the victim is also necessary. 'All external and inner harm which the victim suffered at the hands of the perpetrators or their collaborators may be considered for the objective characterization of a crime against humanity. Insofar as the injury has had an effect, it belongs to the elements of the offence. Furthermore, a danger or threat caused by the perpetrator and experienced by the victim, depending on the circumstances, may already signify or carry with it sufficient harm for the victim (example; a person who is the subject of a dangerous denunciation commits suicide out of fear, or flees into the woods and dies of hunger). Only from this perspective can what the perpetrator planned, intended, prepared or sought, or what harm the act could have generated, be of interest for the objective definition of the act. In addition, however, the ingredients of the act cannot be realised by what the victim did not actually suffer but could easily have suffered (15). "This clarification makes it possible to state that, in respect of crimes against humanity, attempt is conceptually impossible in the German legal sense. Nonetheless, the attempt as such to commit harm may by itself fall within the definition of a crime against

Other cases can also be mentioned.¹³²

The customary rule has been codified in Article 25(3)(f) of the ICC Statute, whereby a person is criminally responsible if he 'attempts to commit [a crime under the Court's jurisdiction] by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions'.

Clearly, what is required for the attempt to be punishable, is: (i) conduct consisting of a significant commencement of the criminal action (to hold to the example given above, it is not sufficient for the guard to take the prisoner out of his cell and possibly even shout at, or abuse, him; it is necessary for the guard to start beating him savagely); (ii) the clear intention to commit a crime, (iii) failure of that intention to take effect owing to external circumstances.

The ICC Statute codifies international customary laws in another respect as well. Article 25(3)(f) duly takes account of the cessation of the attempter's criminal intention and leaves his initial steps unpunished

humanity even if the worst possible results did not occur* (15). Turning to the specific offence at issue, the Supreme Court held that it constituted dangerous bodily harm, which however did not fall under the category of crimes against humanity. In its view, even if the act 'did prejudice the non-material value of the (young man) it did not do so with an effect on humanity in general [...] The more serious harm that the accused had intended for the [young man] did not materialise. The fact that the accused had tried to cause harm must not be taken into consideration as regards the objective elements of the offence. Humanity as the bearer and protector of the non-material values is not prejudiced by such an act; should this act—insofar as it was not punishable under German criminal law—remain unpunished, it would not be unbearable for humanity (18). See also V. (so called Nu ,ase), at 21. ('Certainly, the sense of repugnance [that the act would arouse in an ideal observer] mentioned in the submission ruling can already occur when the person affected has only been exposed to the danger of harm. Endangerment by denunciation can only be a crime against humanity by virtue of the typical hardship of inhumanity that the denunciation has effected. An attempted crime against humanity does not even come into question, since, as explained in Sts 3/48 (P. case) an attempt is inconceivable with this type of crime.') Another relevant case is O., at 391-2 (the Berlin Court of assize held that there was no evidence of the harm to the victim; it added that 'in the action of the accused one could see the beginning of execution of the crime against humanity'; however, according to the Court, the notion of attempt had already been excluded from the notion of crimes against humanity by the Supreme Court in Cologne; the accused was therefore to be acquitted of the charge of crime against humanity: at 392).

¹³² See the cases reported in *Law Reports of Trials of War Criminals* (UN War Crimes Commission), vol. VI, at 120 and vol. VII at 73.

However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Thus, to continue with one of the aforementioned example, if the guard, after beating the prisoner for a while, suddenly decides not to carry through his initial purpose and takes the prisoner back to his cell, he is not guilty of attempted murder (although he may well be guilty of other crimes). Similarly, if an officer gives an order to shoot and kill a group of innocent civilians and then, just before the order is carried out, changes his mind and orders that their lives be spared, he is not considered criminally liable for murder (although he may be guilty of inhuman treatment or even torture, if he intended to carry out a mock execution). As for the *mens rea* required for attempt, it may be noted that in common law countries as well as in many civil law systems, what is normally required is the intention to carry out the offence (recklessness is not enough). It would seem that also in ICL the subjective element required is intent.

2.20.48 PLANNING

Planning consists of devising, agreeing upon with others, preparing, and arranging for the commission of a crime. Think, for instance, of planning an air attack on civilians or the use of such prohibited arms as chemical or bacteriological weapons, or the indiscriminate killing of civilians as part of a widespread or systematic attack on civilians. As stated by various courts, planning implies that 'one or several persons contemplate designing the commission of a crime at both the preparatory and executory phases'.¹³³

Given the nature and features of international crimes, it is often the higher military or civilian authorities that carry out the planning,

Whoever takes part in the planning of an international crime is liable to punishment for the relevant crime, whatever his rank in the hierarchy and the

¹³³ Akayesu TJ, §480; BlaskićTf, §279; Kordić andČerkez, TJ, §386; Brima antiothers, Tf, §765

level of his participation (although of course the rank and role may be germane to punishment; it is evident that the higher the status of the planner and the intensity of his participation in the planning, the harsher his penalty should be).

The subjective element required is the intent to carry out the criminal conduct: the offender 'directly or indirectly intended that the crime in question be committed'.¹³⁴

A difficult question is whether planning an international crime is punishable per se, regardless of whether or not it leads to the actual commission of the crime planned, or instead is only punishable if planning is followed up by perpetration of the crime. TCs of the ICTR opted for the latter solution in a number of cases.¹³⁵ They grounded this conclusion on the works of the International Law Commission and on the interpretation of the relevant rule of the ICTR Statute (Article 6(1)) laying down the principle of individual criminal responsibility, which 'implies that the planning or the preparation of a crime actually must lead to its commission' (Musema, §115).

It may be noted that prosecuting someone for planning, where the planning is not put into effect, comes close to prosecuting conspiracy (although with conspiracy there must be an agreement of two or more persons, whereas planning may be carried out by one person alone, and if done by more persons, no agreement is required). The ICTY and ICTR Statutes allow conspiracy for genocide, but not for crimes against humanity and war crimes. (This was also the position of the IMT at Nuremberg: conspiracy to commit crimes against peace was held admissible, whereas conspiracy to commit crimes against humanity and war crimes was not.)

An ICTY TC, ruling in *Kordic and Cerkez*, propounded a contrary view. It held that 'an accused may be held criminally responsible for planning alone' (§386). The reason for this conclusion is that 'planning constitutes a discrete form of responsibility under Article 7(1) of the Statute'. However, the TC set forth two

¹³⁴ *Blaškić* T, §278; *Kordić and Čerkez*, T, 5386; *Bagilishema*, T, §31; *Brimia anif otferi*, TJ, §7

¹³⁵ *Akayesu* (§475), *Rutaganda* (§34), and *Musema* (§115).

caveats: first, 'a person found to have committed a crime will not be found responsible for planning the same crime'; secondly, 'an accused will only be held responsible for planning, instigating or ordering a crime if he directly or indirectly intended that the crime be committed' (§386).

Although there is no consistent case law on this matter, it would seem that the gravity of international crimes (or at least of the most serious among them) may warrant the conclusion that planning the commission of one or more of such crimes are punishable *per se* even if the crime is not actually perpetrated. The rationale is that ICL aims not only to punish persons found guilty of crimes, but also to prevent persons from engaging in serious criminal conduct. Consequently, in case of doubt criminal rules must be interpreted as being also designed as far as possible to prevent offences.

It would follow that planning an international crime is also punishable *per se* as a distinct form of criminal liability, subject to a set of conditions that can be derived from the general system of ICL:

1. Only the planning of serious or large-scale international crimes constitutes a discrete offence: for instance, the planning of massive war crimes (such as the extermination of a large number of prisoners of war, or the large-scale deportation of civilians to extermination camps), or of crimes against humanity, or genocide. Since the rules on planning do not specify the legal ingredients of this crime, it seems warranted to maintain that, for international crimes of lesser gravity (for instance, ill-treatment of one prisoner of war, the taking by members of the Occupying Power of private property belonging to civilians), those rules must be construed in such a way as to favour the accused (*favor rei*). Consequently, the mere planning of those crimes of lesser gravity may be held not to constitute a crime *per se*.
2. If planning is followed up by execution of the crime by the same person, planning is no longer punishable as a crime distinct from that resulting from its execution: the perpetrator may not be convicted of both planning and committing

the crime, for the latter 'absorbs' the former.¹³⁶ (in this respect planning is different from, hence may not be equated to, such 'inchoate crimes' as conspiracy to commit genocide and incitement to genocide, to be discussed below). Nevertheless, the fact of planning the criminal offence may be held to constitute an aggravating factor.¹³⁷

3. As for the requisite mens rea, it is necessary for the author to intend that the planned crime be committed, or else he must be aware of the risk that the planned crime would be perpetrated by him or by someone else (recklessness or *dolus eventualis*).

2.20.49 CONSPIRACY

2.20.49.1 GENERAL: THE NOTION OF CONSPIRACY

It is common knowledge that conspiracy is a form of criminality punished in common law systems, but either unknown to, or accepted to a very limited extent by, civil law countries. Conspiracy is a group offence, consisting of the agreement of two or more persons to commit a crime. It is punished even if the crime is never perpetrated. In addition, if the crime is carried out, the perpetrators are held liable both for conspiracy and for the substantive crime they commit. The mens rea element of conspiracy required for each and every participant is twofold: (i) knowledge of the facts or circumstances making up the crime the group intends to commit; (ii) intent to carry out the conspiracy and thereby perpetrate the substantive offence. Plainly, the basic rationale behind the prohibition of this crime is the need to prevent offences, especially when they involve several persons and are thus more dangerous to the community.

As noted above, in international law no customary rule has evolved on conspiracy on account of the lack of support from civil law countries for this category of crime. (In civil law systems, entering into agreement to commit a crime is not punishable *per se*, unless it leads to the perpetration of the crime;

¹³⁶ ICTY TC, KordU, S386; Brdanm, §268; SPCS TC, Bi-ima and others, §767.

¹³⁷ ICTY TC, Siakic, §443; SPCS TC, Brima and others, §767.

only exceptionally, and for such categories of serious offences as those aimed at undermining state security or at setting up associations or organizations systematically bent on criminal conduct in various areas, is conspiracy as such prohibited). In 2006 in *Hamdan* the US Supreme Court, per Justice Stevens, rightly ruled out that conspiracy is criminalized as a war crime in international law (at 9-12, 46-56).

Treaty rules on conspiracy can only be found in the London Agreement of 1945. In Article 6 it made punishable persons 'participating in a Common Plan or Conspiracy for the accomplishment' of any crime against peace and in addition made leaders, organizers, instigators or accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes [that is, crimes against peace, war crimes, and crimes against humanity] responsible for all acts performed by any persons in execution of such plan'. This provision laid down *ex post facto* law. However, as it referred to conspiracy to commit a crime against peace, it punished persons who had conspired to wage the war that had just ended. In addition, to the extent that it referred to other crimes, it also made conspiracy punishable for acts already accomplished. In other words, in the end conspiracy was held to be punishable to the extent that any plan or agreement to commit an international crime had been actually carried out. (Strikingly, Control Council Law no. 10 only referred to conspiracy to commit crimes against peace: see Article 2(l)(a).)

Nevertheless, generally speaking, both the IMT at Nuremberg and the Military Tribunals sitting at Nuremberg took a restrictive view of conspiracy: see, in particular, *Goring and others* (at 224-6) and *Alstotter and others* (at 289-90). In the former case the influence of the French Judge *Donnedieu de Vabres*, and his insistence on the novel nature of conspiracy in international law, were indisputably decisive.¹³⁸

¹³⁸ H. *Donnedieu de Vabres*, 'Le procès de Nuremberg devant les principes modernes du droit pénal international' in 70 HR (1947-1), 528-42. Among other things he held the view that in the event Article 6 (in fine), of the Nuremberg Charter upheld the French notion of '*complicité*' (at 541). He also emphasized that, with regard to crimes against peace, the IMT ultimately avoided holding that there was a general conspiracy (at 541-2).

As noted above (7.3.4) it is warranted to hold that conspiracy to engage in a war of aggression is criminalized by a customary rule of international law. However, the getting together or more persons and their agreeing to undertake a war or other acts of aggression is punishable only if such concerting measures for acts of aggression is not followed up by the actual waging of aggression. If aggression is subsequently carried out, this crime 'absorbs' the crime of conspiracy, unless those who conspired are different from the persons who in fact undertook the aggression (in which case the former are responsible for conspiring and the latter for aggression).

2.20.49.2 THE OFFENCE OF CONSPIRACY TO COMMIT GENOCIDE

The only treaty rule on conspiracy currently in force is Article 3(b) of the 1948 Genocide Convention, which, on the grounds and motivations set out above, makes 'conspiracy to commit genocide' punishable (genocide was deemed to be such an odious crime that even the mere agreement to commit it or its planning without any practical follow-up that is, execution of the crime, were banned and criminalized). It would seem that, like most other substantive provisions of the Convention, it has turned into customary law. Among other things it has been taken up in the Statutes of both the ICTY and the ICTR (but, strikingly, not in Article 6 of the ICC Statute, which consequently differs in this respect from international customary law).

In *Musema* an ICTR TC held that conspiracy to commit genocide 'is to be defined as an agreement between two or more persons to commit the crime of genocide' (§191).¹³⁹ In *Nahimana and others* the ICTRTC added some interesting remarks on the modalities of reaching agreement, as part of the conspiracy to commit genocide. It noted that:

Conspiracy to commit genocide can be comprised of individuals acting in an institutional capacity as well as or even independently of their personal links with each other. Institutional coordination can form the basis of a conspiracy among

¹³⁹ See also Kajelijeli, TL §788; *Nahimana and others*, T, S1047.

those individuals who control the institutions that are engaged in coordination action. The Chamber considers the act of coordination to be the central element that distinguishes conspiracy from 'conscious parallelism', the concept put forward by the Defence to explain the evidence in this case (§1048).

As for mens rea, it rests on the concerted intent to commit genocide, that is, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Thus [...] the requisite intent for the crime of conspiracy to commit genocide is ipso facto the intent required for the crime of genocide, that is the *dolus specialis* of genocide (Musema, TJ §192).

As noted above, the crime of conspiracy to commit genocide is punishable even if it fails to lead to its result; that is, even if genocide is not perpetrated.¹⁴⁰

2.20.50 INCITEMENT TO GENOCIDE

Incitement is only prohibited in ICL with regard to genocide. The perceived gravity of genocide accounts for this legal exception. Genocide is held to be such a heinous crime involving the annihilation of entire human groups, that any act or conduct leading to, or pushing towards, its perpetration is banned and criminalized.

However, incitement to genocide, to be punishable, must be not only direct but also public (for clarification of these two notions, see below). At the same time incitement is criminalized as such; that is, even it is not followed by the commission of genocide.¹⁴¹

Incitement must be public: the fact of inducing or provoking other persons to engage in acts of genocide must be performed in a public place (for instance, a square) or in a public gathering, through speeches, 'shouting or threat' (Akayesu TJ, §559) or 'through the sale or dissemination, offer for sale or display of written material or printed matter [...] or the public display of placards or posters' (ibid.), or else through such means as radio or television capable of reaching the

¹⁴⁰ Musema, T}, §194; Niyitegeka, T), §423; Nahimana and others, T), §1044; KajeUjeh, Tf, §78!

¹⁴¹ Akayesu, Tf, §§561-2; Musema, T,, §§193-4; Kajeli)eli,Tf. §855; Nahimana, TJ, §1029.

general public at large.¹⁴² Incitement made in private, for instance to small and selected groups, may, however, amount to conspiracy to commit genocide (Akayesu, TJ, §556; AJ, §480).

Incitement must also be direct, that is, it must specifically provoke or induce other persons to engage in genocide. In other words, it must not consist of vague and indirect suggestions. Nevertheless, even implicit messages or utterances may amount to incitement, as long as the addressees immediately grasp the implications of the message in light of its cultural and linguistic content.¹⁴³ For instance, the use of the term 'cockroaches' referring to Tutsis in the Rwandan context, as possible targets of genocidal action, could amount to incitement (Akayesu, TJ §§557-8),

As for the subjective element of the crime, an ICTR TC held that [it] lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (Akayesu, TC, §560).

An interesting case is Ruggiu, the journalist of 'Radio Mille Collines' accused by the ICTR Prosecutor of 'direct and public incitement to commit genocide and crime against humanity (persecution)'. He pleaded guilty. An ICTRTC found that when examining the acts of persecution which have been admitted by the accused, it is possible to discern a common element. Those acts were direct and public radio broadcasts aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminator grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the

¹⁴² Akayesu, T), §§556 and 559; Kajelijeli, TL §851; Nahimana, TI, §431.

¹⁴³ Akayesu, TL §558; KajeUjeli, T), §853; Nahimana, T), §§1004-6.

death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself (§22).

2.20.51 ORDERING

Ordering is a mode of responsibility entailing that a de jure or de facto superior (within a military or civilian hierarchy) issues a command to a subordinate to the effect that he or she must take a certain course of action that is contrary to law and amounts to a criminal offence.¹⁴⁴ As an ICTY TC rightly held in *Kordic and Cerkez*: (§388), 'no formal superior- subordinate relationship is required for a finding of "ordering" so long as it is demonstrated that the accused possessed the authority to order'. This proposition, albeit not supported by any legal reason in the judgment, is warranted because ICL is not a formalistic body of law geared to legal technicalities but aims at proscribing and punishing crimes whatever the modalities of their commission.

As held by ICTY TCs,¹⁴⁵ there is no need for the order to be given in writing or in any particular form. In addition, the existence of an order may be proved through circumstantial evidence.

If the order issued by a superior authority is passed on by a subordinate authority down the chain of command, the latter authority, depending upon the circumstances, may also be held to be responsible for ordering an illegal act (*Kupreskic*, TJ, §§827,862).

It would seem that it is not necessary for the order to be executed. An officer or any other higher authority issuing a criminal order may be found guilty even if the order is not carried out by the subordinates, if the superior intended the order to be executed and knew that the order was illegal, or else the order was manifestly illegal. Thus, in *General Jacob H. Smith*, in 1902 a US Court Martial held that

¹⁴⁴ See for instance *Krstic*, TJ, §601; *Naletilic and Martinovic*, TJ, 161; *Stakic*, TJ, §445; *Semanza*, TJ, §382; *Baplishema*, TJ, §31; *Rutaganga*, TJ, §39; *Kamuhanda*, TJ, §594.

¹⁴⁵ *Blaikic* (§281) and *Kordic and Cerkez* (§388). See also SCSL TC, *Brima and others*, §772.

General Smith was guilty of ordering that no quarter should be given to the enemy in the Philippines, even though in fact his troops did not comply with this order (at 799-813). In many other cases courts have convicted officers for issuing criminal orders, even if such orders were not executed.¹⁴⁶

If the internationally unlawful order is executed, the person issuing the order is criminally liable qua co-perpetrator of the crime carried out by the subordinate.

Also for this category of criminality the requisite mental element is the intent to have the crime committed,¹⁴⁷ at least, as long as the order is specific; that is, instructs to perform a specific crime. However, when the order is generic, recklessness or even gross negligence may be considered sufficient.¹⁴⁸

So far we have addressed the issue of orders that impose to engage in criminal conduct. Plainly, if a superior issues a lawful order (for example, bombing military installations near civilian houses, after taking all the necessary precautions imposed by international humanitarian law) and the subordinates, in partial non-compliance with the order, commit a war crime (for instance, deliberately

¹⁴⁶ See, for instance, High Command (at 118-23), The Hostages Trial (at 118-23), Kurt Maytr (at 98 and 108), Falkenhorst (at 18,23,29-30), Hans Wickmann (at 133). In Twfan and others v. IDF Advocate and others (Yehuda Meir case). Judge D. Levin (concurring) held that 'the higher the rank of the commanding officer and the more comprehensive and more decisive his authority, the greater the responsibility incumbent upon him to examine and determine the justification and legality of the order' (at 745). It should be noted that ordering is sometimes treated as a species of instigation, for instance ordering that no quarter be given may be regarded as the same thing as inciting troops to commit war crimes.

¹⁴⁷ In *fung and Schumacher*, decided by a Canadian Military Court sitting at Aurich in Germany, the Judge Advocate, in discussing the position of the defendant lung, who had ordered the other defendant to shoot and kill a Canadian war prisoner, noted the following: 'The Court may find that the accused uttered the words or some words to do harm to the prisoner, but it must be found that he uttered them with the expectation and intention that they should be acted upon by someone who heard them, including Schumacher. In this event he would have either incited, counselled or procured the acts to have been done, and so be concerned [in the crime]. Now, if you find that the accused lung handed the prisoner over to Schumacher, knowing or expecting he would be killed, then again he would be concerned [in the killing of the Canadian POWr (at 219-20). On the requisite of intent in ordering, see *Blaskic*, TJ, §278; *Kordic and Cerkez*, TI, §386; *Stakic*, TJ, §445; *BagiUshema*. TJ, §31.

¹⁴⁸ In one case a Canadian Court Martial held that the defendant was guilty of negligence for issuing unlawful orders (he had instructed his subordinates that prisoners 'could be abused'): see *Major A.G. Seward* (at 1079-81). Interestingly, the defendant was acquitted on another count, namely of having caused bodily harm to the Somali civilians beaten up, tortured, and killed by his subordinates. The Court Martial Appeals Court of Canada noted in this regard that by this acquittal the defendant 'must be taken to have been found neither to have intended nor to have been capable or reasonably foreseeing that any of his subordinates would mistreat unto death anySomalian [sic] prisoner' (at 1082)

bombing some civilian dwellings as well, or else failing to take the necessary precautions), the ordering official is not criminally liable for that war crime.

However, there may be cases where even a lawful order may involve the responsibility of the superior. This occurs when it can be proved that the superior was aware that the execution of his or her order was most likely to lead to the commission of a war crime and nevertheless willingly took this risk. A case in point is *Blaskic*. An ICTY TC had held that the defendant had ordered artillery fire against some villages; a massacre of civilians had ensued; according to the Chamber, 'even if doubt were still cast in spite of everything on whether the accused ordered the attack with the clear intention that the massacre would be committed, he would still be liable under Article 7(1) of the [ICTY] Statute for ordering the crimes' (§474). Hence the TC held *Blaskic* guilty for this order as well. On appeal, the AC held, however, that the test of recklessness had not been rightly set out. In its view, while it may be correct to require a culpable mental state lower than intent and thus admit recklessness (or *dolus eventualis*), the mental element required by the TC was too low a standard: under such standard 'any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur (A), §41). The correct standard, according to the AC, is awareness of a substantial likelihood of risk plus a volitional element, namely acceptance that the risk may ensue.¹⁴⁹

2.20.52 GENERAL

International criminal liability may arise not only as a result of a positive act or conduct (killing an enemy civilian, unlawfully destroying works of art, etc.) but

¹⁴⁹ According to the AC "The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur. The Appeals Chamber considers that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard' (AJ, §41). The Chamber went on to hold that 'a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime' (§42).

also from an omission; that is, failure to take action. Omission is only criminalized when the law imposes a clear obligation to act and the person willfully or recklessly fails to do what was legally required.

It took a long time for a general rule on this matter to evolve in international criminal law. The reason for this state of affairs is clear. The first body of substantive rules restraining conduct in war, namely traditional international humanitarian law, tended to prohibit action; in other words, it imposed on combatants the obligation not to engage in conduct contrary to some international standards (killing civilians, raping women, shelling hospitals, etc.). By the same token it refrained, as a rule, from imposing positive obligations to do something. The purpose of this body of law was to ensure respect for a modicum of legal standards by belligerents. Law largely respected the autonomy of states, leaving them free to pursue their ends and purposes in war, and only banned (and later criminalized) glaring breaches of the most fundamental standards of behaviour. The law did not go so far as also to require that belligerents should take some kind of positive action to protect civilians and other victims of warfare. International law-makers did not deem it expedient to restrict states' conduct by establishing obligations requiring states to do a particular thing under some specific circumstances.

Progress was made after the Second World War, when an 'interventionist' attitude in international humanitarian law, intended to broaden the protection of war victims, gradually replaced the previous liberal laissez-faire approach', substantially geared to freedom of states subject to some exceptional prohibitions. As we shall soon see, many provisions of the 1949 Geneva Conventions clearly laid down the duty to do something and considered failure so to act as criminal.

As we shall see below, after the Second World War one particular class of responsibility by omission, that is, superiors' responsibility, has taken on distinct features and evolved as a discrete and important form of this category.

2.20.53 RULES IMPOSING A POSITIVE OBLIGATION TO ACT

Some provisions of the Geneva Conventions lay down unconditional (in other words, unqualified) positive obligations. For instance, this holds true for article 16(4) of the First Geneva Convention (on the wounded and sick armed forces in the field), which contains positive prescriptions concerning the preparation and transmission by one belligerent to the other, of death certificates or lists of the dead. It also holds true for Article 17 of the same Convention, which provides for the burial or cremation of the dead.¹⁵⁰ Other provisions lay down positive obligations that are, however, very sweeping and therefore leave to Contracting States a fairly broad margin of appreciation. This applies for instance to Article 14(2) of the Third Geneva Convention (on prisoners of war), concerning the duty to protect prisoners of war against acts of violence or intimidation; Article 15 of the same Convention, requiring maintenance of prisoners of war free of charge; and Article 29 of the same Convention, on the duty to take all sanitary measures necessary to ensure the cleanliness and hygiene of detention camps. Similarly, Article 36 of the First Additional Protocol obliges states studying, developing, acquiring, or adopting new weapons to ascertain whether these weapons are prohibited by international law. Articles 76 and 77 of the same Protocol protect women and children, respectively, against various forms of assault by imposing on states broad positive obligations. Articles 82 and 83 of the Protocol similarly lay down positive obligations concerning the provision and availability of legal advisers, and dissemination of the Conventions and Protocol respectively.

As stated above, some provisions contain qualified obligations. For instance, Article 12(5) of the First Geneva Convention provides that a party to the conflict compelled to abandon wounded or sick to the enemy must leave with them a part

¹⁵⁰ Similar provisions may be found in Articles 19 and 20 of the Second Geneva Convention (on the wounded, sick, and shipwrecked at sea); as well as in Article 32(5) of the First Geneva Convention (on the treatment of neutral personnel lending assistance to a belligerent and falling into the hands of the adversary belligerent); in Articles 69-77 of the Third Geneva Convention (on prisoners of war), relating to relations of prisoners of war with the external world; Article 118 of the same Convention, concerning release and repatriation of prisoners of war at the close of hostilities (violation of this provision amounting to a grave breach, pursuant to Article 85(4)(b) of the First Additional Protocol); Article 121 of the same Convention, concerning the duty to establish an official inquiry into the death or serious injury of prisoners of war; and Article 122 of the same Convention, providing for the establishment, by each belligerent, of an information bureau concerning prisoners of war.

of its medical personnel as well as material, 'as far as military considerations permit'. Similarly, Article 12(2) of the Second Geneva Convention provides that enemy wounded, sick, or shipwrecked 'shall not be willfully left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created' (emphasis added). Article 60 of the Third Geneva Convention imposes on the Detaining Power the duty to grant all prisoners of war a monthly advance of pay, and specifies the amount of advance each class of prisoner must obtain (depending on their rank); however, the provisions go on to state that this amount may be modified by special agreement between the parties to the conflict, or by the Detaining Power, subject to some conditions. Articles 55 and 56 of the Fourth Geneva Convention (on civilians), relating to provision of food and medical supplies and hygiene and public health, respectively, are qualified by the proviso 'to the fullest extent of the means available' to the Occupying Power.¹⁵¹

2.20.54 CULPABLE OMISSION OF AN ACT MANDATED BY AN INTERNATIONAL CRIMINAL RULE

Serious violations of many of the above positive obligations (for instance, those enjoining to protect women and children from assault), as well as others laid down in other provisions¹⁵² amount to an international crime, more specifically to war crimes, as held by the ICTY AC in Tadic (IA): Article 7(1) of the ICTY Statute, on individual criminal responsibility also covers 'the culpable omission of an act that was mandated by a rule of criminal law (§188). Of course, it is necessary for the conditions set forth in the same decision in Tadic (IA) (§§94-5), determining

¹⁵¹ Similarly, Article 69(1) of the First Additional Protocol imposes upon the Occupying Power the obligation to provide to the civilian population means for satisfying its basic need, 'to the fullest possible extent of the means available' to that Power. Article 70 of the same Protocol provides for relief actions in favour of the civilian population in occupied territories 'subject to the agreement of the Parties concerned in such relief actions'.

¹⁵² See, for instance, Sumida Haruzo and others (at 228-9, 278, and 280-2) for the breach of the duty to provide food and care to detained civilians as a war crime. In Gozawa Sadaichi and others it was held that the lack of food and medical supplies, as well as the existence of bad conditions for prisoners of war, amounted to a crime of which the detaining authorities were guilty (at 200-1, 210-11, 222-3, and 227-31). See also Schmitt (decision of the Antwerp Court Martial, at 751-2, and the subsequent decision of the Cour militaire de Bruxelles, at 752, nt. 89 bis), as well as Koppelman Ernst (decision of the Brabant Court Martial, at 753-4, and of the Belgian Court of Cassation, at 185-6). In both cases the courts dealt with the positive obligations of the commanders of detention camps for prisoners of war

which violations may be regarded as war crimes, to be met. However, in some instances, specified in the relevant provisions, a serious violation may amount to a 'grave breach', with the attendant consequences with regard to the mandatory character of 'universal' judicial repression at the national level (see *infra*, 16.1).

As in the case of crimes consisting of positive conduct, criminal omission also may only be punished if accompanied by a certain subjective frame of mind. As in those cases, this mental element may vary, depending on the requirements of international rules. Normally intent is required. However, in some cases the relevant rules or provisions of international criminal law may require a less demanding subjective element, such as recklessness.¹⁵³ It would seem admissible to hold the view that, at least in some instances, and subject to strict conditions, even culpable negligence might suffice for criminal liability to arise.¹⁵⁴

¹⁵³ In *Niagerura and other* the ICTR TC set out the necessary subjective and objective elements of the crime as follows: 'The TC finds that in order to hold an accused criminally responsible for an omission as a principal perpetrator, the following elements must be established: (a) the accused must have had a duty to act mandated by a rule of criminal law; (b) the accused must have had the ability to act; (c) the accused failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and (d) the failure to act resulted in the commission of the crime' (§6.58). See also *Blaskic* (W, ¶ 663), *GaUc W*, § 175), and *Brdanin* (A), §§274-5).

¹⁵⁴ A case where it would seem that a British court considered culpable negligence sufficient is *Heinrich Gerike and others* (the *Veipke Baby Home* trial). The defendants were charged with war crimes for violating Article 46 (on respect for family honour and life by the Occupant) of the 1907 Hague Rules, for leaving without food and care the children of Polish female workers compulsorily separated from their parents and brought to a home for infants in *Veipke*; as a result of lack of care many children had died. The Prosecutor, Major Draper (a Judge Advocate being absent) argued that the staff in charge of the children 'were so grossly and criminally negligent that they did in fact cause the death of something over 80 children in six months' (at 326). He then noted that one of the questions arising in the case was whether 'that neglect [was] more than something that was gross and reckless, or was [...] wilful disregard of consequences to such an extent that the party or parties responsible are deemed to have intended the natural and probable consequences of their act, namely, that death would result' (at 326). He then pointed out that in either event it is the contention of the Prosecution that they are within the charge which is laid before this Court, namely, that the accused are concerned between the relevant dates in the killing by wilful neglect of a number of children, Polish nationals' (*ibid.*). He then cited *Archbold* on gross negligence and recklessness (at 336-7), noting that his propositions were 'in point in this case' (at 337). The Court found two defendants not guilty (neither of them had been entrusted with the care of the children; one had consistently disapproved of the running of the Home and consequently decided to keep aloof, the other had tried unsuccessfully to have the Home removed); it sentenced the remaining four either to death by hanging or to imprisonment (at 339-43).

CHAPTER 3

THE GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL CRIMINAL LAW

3.1 THE EMERGENCE OF THE DOCTRINE

Although it was adumbrated after the First World War,¹⁵⁵ it was in the aftermath of the Second World War that there evolved in international law the notion of criminal responsibility of superiors for failure to prevent or punish crimes perpetrated by their subordinates. The gradual evolution of ICL on the matter can be roughly divided up into various phases.

At the outset law-makers and courts considered that military commanders were to be held criminally liable for failure to prevent or punish, for in so acting they in some way aided and abetted the crimes of their underlings. Some national laws set out the notion tersely and conceived of such responsibility as a form of complicity.¹⁵⁶ For instance, the French Order on War Crimes of 28 August 1944 provided in Article 4 that where a subordinate is prosecuted as the principal perpetrator of a war crime and his hierarchical superiors may not be investigated as co-perpetrators, they shall be held to be accomplices to the extent that they have organized or tolerated the criminal offences of their subordinates (emphasis added).

Here the notion was clearly set out that a military commander is criminally liable as an aider and abetter, if he tolerated—that is, failed to stop or repress—the commission of war crimes by his subordinates. A slightly broader notion was embodied in the Chinese law of 24 October 1946 on the trial of war criminals, which, however, like the French law, regarded culpable commanders as

¹⁵⁵ See the proposals of the 1919 International Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, in 14 AJIL (1920), at 121.

¹⁵⁶ See the French Law of 1944 and the Chinese Law of 1946 quoted in UN Law Report, vol. IV, at 87-8.

accomplices of the subordinates committing crimes.¹⁵⁷ In 1949-50 two Belgian Courts Martial took the same approach in *Schniitt*, although they stressed the notion that a commander is under a set of obligations, the breach of which may entail his criminal liability.¹⁵⁸

A further step in the evolution of the doctrine can be seen in a leading, if controversial, US case, *Yamashita* (1946). In this case the first fully fledged enunciation of the doctrine was propounded, again with regard to military commanders. The court did not base itself on the notion of complicity but only stressed that command responsibility is consequent upon the breach of the duties incumbent upon commanders. Given the importance of the case a few words of explanation prove necessary.

The Japanese general Yamashita had been Commanding General of the Japanese Army in the Philippines between 1943 and 1945. His soldiers had massacred a large part of the civilian population of Batangas Province and inflicted acts of violence, cruelty, and murder upon the civilian population and prisoners of war, as well as wholesale pillage and wanton destruction of religious monuments in the occupied territory. The US authorities accused the General, before a US Military Commission, of breaching his duty as an army commander

¹⁵⁷ Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals.'

¹⁵⁸ The Antwerp Court Martial dealt with the case of a German head of a prisoners of war camp at Breedonck where many inmates died either of fatigue for the forced labour to which they had been subjected or of starvation, whereas some 32 inmates were killed by some of the prison guards. The Court applied Art. 66 of the Belgian Penal Code (which made liable for a crime both the perpetrators and aiders and abettors). It stressed that the defendant; as head of the camp *had the positive duty to protect prisoners in his custody' (at 751). The Court therefore found that he was accountable, as co-perpetrator, for the killing for the 32 inmates, whereas for the death of the inmates resulting from excessive fatigue or starvation he was liable as an accomplice, on account of his breach of his duty 'since he had rendered such assistance that without it the crimes could not be committed'; 'he had seriously breached his duty as head of the camp and hence voluntarily and consciously cooperated to the criminal activity of the Sicherheitsdienst [the SS branch whose members were in charge of the camp at his orders] (ibid.). On appeal, a Military Court of Appeal upheld the decision and noted that the defendant's action was twofold: 'positive', where he imposed exhausting labour and ordered the destruction of food parcels, and 'negative*', where he refrained to step in to prevent cruel acts. The appellant, the Court went on to hold, must be punished for both classes of conduct. As for the latter, he was punishable for the breach of his duty to see to it that 'the inmates in his camp be adequately nourished and treated' so as not to 'become physically exhausted and unable to work'; this duty, the Court noted, was similar to 'that incumbent upon a person charged with nourishing another person unable to attend to himself, and who gets him to starve'. In this case 'the failure to act constitutes the material act sufficient to evidence criminal intent' (at 752).

to control the operations of his troops 'by permitting them to commit' extensive and widespread atrocities. The Commission upheld these submissions by setting out a new doctrine as follows:

Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them (1597).

The US Supreme Court, to which the case had been brought by the defendant by way of a petition for habeas corpus agreed. It held that commanders had a duty to take such appropriate measures as are within their power to control the troops under their command for the prevention of violations of the laws of warfare. It derived this duty from a number of provisions of such laws: Articles I and 43 of the Regulations annexed to the Fourth Hague Convention of 1907 (under the former, combatants, to be recognized as legitimate belligerents, must 'be commanded by a person responsible for his subordinates'; pursuant to the latter, the commander of a force occupying enemy territory shall take all the measures in his power to re-tore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'); Article 19 of the Tenth Hague Convention of 1907, relating to bombardment by naval vessel and providing that commanders-in-chief of the belligerent vessels 'must see that the above Articles are properly carried out'; Article 26 of the 1929 Geneva Convention on the wounded and sick. which made it the duty 'of the commanders-in-chief of the belligerent armies to provide for the detail of execution of the foregoing Articles [of the Convention] as well as for unforeseen cases'???? The Court's majority held that these provisions made it clear that the accused had an affirmative duty to take such measures as were within his power

and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals (13).

However, two judges. Murphy and Rutledge, forcefully (and rightly) disagreed and set forth their views in important Dissenting Opinions. They noted among other things that the Court's majority had not shown that Yamashita had 'knowledge' of the gross breaches perpetrated by his troops (at 31, 36, 48-9, 50) or had any 'direct connection with the atrocities' (at 36), or could be found guilty of 'a negligent failure [...] to discover' the atrocities (at 49) or in other words, had 'personal culpability' (at 36-79).¹⁵⁹

This is therefore a case where the principle was affirmed, based (as the two dissenting judges rightly noted), on a novel interpretation of existing rules of IHL, as well as a questionable application of the principles to the case at bar, in addition to total disregard for the required mental element for the crime.

Although case law thus started off on the wrong foot, soon other decisions handed down after the Second World War followed suit and fleshed out the doctrine. Unlike Yamashita, these decisions, which can be considered as a third step in the formation of the doctrine at issue, emphasized the need for the commander to have knowledge of the crimes committed by his underlings, in some instances also requiring criminal intent for the commander's liability to arise. They all neglected the notion of complicity. Furthermore, in some cases the doctrine was extended to civilian leaders.

In Karl Brand and others (Doctois case), a US Military tribunal sitting at Nuremberg under Control Council Law no. 10 held the German top medical staff

¹⁵⁹ Justices Murphy and Rutledge did not only dissent on the application of the law to the facts by the Commission—they also objected to the whole notion of command responsibility as a matter of law. Justice Murphy stated: 'The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed dependent on its biased view as to the petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in less respected nations in recent years' (32/ US, at 28).

liable for the killings perpetrated by their subordinate doctors, stressing that those leaders had knowledge of what was going on.¹⁶⁰ In Pohl and others, a US Military Tribunal held that 'the law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war' (at 1011). The Tribunal required 'actual knowledge' of the misdeeds of subordinates (1011-2). The same doctrine was set out in a subsequent case, Wilhem List and others (Hostages case), where another US Military tribunal sitting at Nuremberg applied it to 12 high-ranking German officers charged, among other things, with the unlawful killing of hostages by way of reprisal. In this case the Tribunal stressed that, to pronounce a guilty verdict, it required 'proof of a causative, overt act or omission from which a guilty intent can be inferred' (1261). Turning to the liability of the defendants for their failure to prevent or punish, the Tribunal noted that, for this form or criminal liability to arise, knowledge by the army commander of the crimes committed by the subordinates was required. Furthermore, the Tribunal emphasized that a commander has the duty to require reports about occurrences

¹⁶⁰ After citing the Yamashita case, the Tribunal stated: "This decision is squarely in point as to the criminal responsibility of those defendants in this dock who had the power and authority to control the agents through whom these crimes were committed. It is not incumbent upon the prosecution to show that this or that defendant was familiar with all of the details of all of these experiments. Indeed, in the Yamashita case, there was no charge or proof that he had knowledge of the crimes [...] But we need not discuss the requirement of knowledge on the facts of this case. It has been repeatedly proved that those responsible leaders of the German medical services in this dock not only knew of the systematic and criminal use of concentration camp inmates for murderous medical experiments, but also actively participated in such crimes. Can it be held that Karl Brandt had no knowledge of these crimes when he personally initiated the jaundice experiments by Dohmen in the Sachsenhausen concentration camp and the phosgene experiments of Bickenbach? Can it be found that he knew nothing of the criminal Euthanasia Program when he was charged by Hitler with its execution? Can it be said that Handloser had no knowledge when he participated in the conference of 29 December 1941 where it was decided to perform the Buchenwald typhus crimes, when reports were given on criminal experiments at meetings called and presided over by him? Was Rostock an island of ignorance when he arranged the program for and presided over the meetings at which Gebhardt and Fischer lectured on their sulfanilamide experiments, when he classified as "urgent" the criminal research of Hirt, Haagen, and Bickenbach? Did Schroeder lack knowledge when he personally requested Himmier to supply him with inmates for the sea-water experiments? Can it be found that Genzken had no knowledge of these crimes when the miserable Dr. Ding was subordinated to and received orders from him in connection with the typhus experiments in Buchenwald, when his office supplied Rascher with equipment for the freezing experiments? Was Blome insufficiently informed in the face of proof that he collaborated with Rascher in the blood coagulation experiments, issued a research assignment to him on freezing experiments and to Hirt on the gas experiments, as well as performed bacteriological warfare and poison experiments himself? No, it was not lack of information as to the criminal program which explains the culpable failure of these men to destroy this Frankenstein's monster. Nor was it lack of power' (934-5).

taking place in the area under his control, failing which he may be accused of 'dereliction of duty' (at 1271-2).¹⁶¹ These notions were taken up and elaborated on by another US Tribunal sitting at Nuremberg in Wilhelm van Leeb and others (High Command case). The Tribunal noted that a commander's 'criminal responsibility is personal. The act or neglect to act must be voluntary and criminal' (at 543). It went on to note that there must be a personal dereliction. That can occur where the act is directly traceable to him [the commander] or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. [...] the occupying commander must have knowledge of these offences [by his troops) and acquiesce or participate or criminally neglect to interfere in their commission and [...] the offences committed must be patently criminal (543-5).¹⁶²

The doctrine was not only embraced by US tribunals. The International Tokyo Tribunal also upheld it in Araky and others (at 29-31). In dealing with responsibility for war crimes against prisoners of war, the Tribunal insisted on the liability of commanders on account of their 'negligence or supineness' (at 30) if a commander that had the duty to know 'knew or should have known' the commission of crimes but failed to stop them or to take 'adequate steps' 'to prevent the occurrence of [...] crimes in the future' (at 31).¹⁶³ Similarly, the

¹⁶¹ If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence' (1271).

¹⁶² The Tribunal also noted the following: 'Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-extensive. Modern war such as the last war, entails a large measure of de-centralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part' (at 543)

doctrine was enunciated by an Australian-US Military Tribunal, in Soemu Toyoda (at 5005-6) and by a Chinese War Crimes Tribunal in Takashi Sakai (at 1-7). It is notable that in Soemu Toyoda the Tribunal, besides insisting on the need for knowledge as a requirement of 'command responsibility, also held that such knowledge may be either 'actual', 'as in the case of, an accused who sees' the commission of the subordinates' crimes or 'is informed thereof shortly after', but also 'constructive knowledge', which can be asserted to exist when there is the commission of such a great number of offences within his command that a reasonable man could come to no other conclusion than that the accused must have known the offences or of the existence of an understood and acknowledged routine of their commission (5005-6).

It can thus be held that in a matter of few years after the Second World War the doctrine of command responsibility crystallized into an international customary rule (i) imposing on military commanders as well as civilian or civilian leaders¹⁶⁴ the obligation to prevent or repress crimes by their subordinates if they knew or should have known that the troops were about or were committing or had committed crimes; and (ii) criminalizing the culpable failure to fulfill this obligation, albeit without clearly outlining the mental element of such criminal liability. That such a rule (the existence of which was authoritatively asserted in *Deialic* and others, TJ, §343) evolved so quickly should not surprise. In modern times international criminality increasingly tends to be planned, organized, ordered, or condoned or tolerated by superior authorities. In other words, a clear trend is emerging in the world community towards commission of crimes either by high-

¹⁶³ The Tribunal found the highest-ranking defendant, prime minister Hideki Tojo, guilty of acts of omission in that 'He took no adequate step to punish offenders [who had ill-treated prisoners and internees] and to prevent the commission of similar offences in the future. His attitude towards the Bataan death March gives the key to his conduct towards these captives. He knew in 1942 something of the conditions of that march and that many prisoners had died as a result of these conditions. He did not call for a report on the incident. When in the Philippines in 1943 he made perfunctory inquiries about the march but took no action. No one was punished.[...] Thus the head of the Government of Japan knowingly and wilfully refused to perform the duty which lay upon the Government of enforcing performance of the Laws of War' (at 462).

¹⁶⁴ For this latter category of cases see in particular. *Alaky* and others (the Tokyo trial), heard by the Tokyo International Tribunal (vol. 20, at 791,816,831), *Flick* and others, brought before a US Military Tribunal sitting at Nuremberg (at 1202-12), *Rochling* and others, heard by a French court in the French Occupation Zone in Germany (at 8, or 403-4), and *Delalic* and others (41370.377-8).

level military or political leaders or by low-level officials or military personnel, who, however, perpetrate crimes because superior authorities (be they military or civilian) do not prevent, or tolerate or at any rate fail to repress them. Hence, the issue of superior responsibility has gradually acquired enormous importance in international criminal law.

Subsequently the customary criminal rule was enshrined in the Statutes of the ICTY, ICTR, and the ICC and has been relied upon in many cases brought before the ICTY and the ICTR. It covers superior responsibility for any international crime committed by subordinates; that is, not only war crimes but also crimes against humanity, genocide, etc.

It is notable that after the establishment of the ICTY and the ICTR the doctrine was gradually refined by case law, also under the influence of the 2002 German Code of Crimes Against International Law¹⁶⁵ and some leading commentators.¹⁶⁶ As a consequence, the criminal liability of the superior was increasingly seen as a consequence of his own culpability, not necessarily linked by means of a causal nexus to the responsibility of the subordinates (see below).

It should be added that in 2003 the ICTY AC rightly set out the notion that command responsibility also applies in time of internal armed conflict, basically because also with regard to such conflicts a general principle of international law assumes that there must be an organized military force: 'military organization implies responsible command and [...] responsible command in turn implies command responsibility'.¹⁶⁷

¹⁶⁵ The Code is important for it draws a clear distinction between three different hypotheses: Responsibility of superiors (Section 4), Violations of the duty of supervision (Section 13), and Omission to report a crime (Section 14), thus identifying the distinct mens rea required for each of these classes.

¹⁶⁶ See, in particular, M. Damaska, "The Shadow Side of Command Responsibility", 49 Am. J. Comparative Law (2001), 455-96.

¹⁶⁷ Hadlihasanovti, Alagic and Kubura, Decision on Interlocutory Appeal Challenging jurisdiction in Relation to Command Responsibility, §17 and see §§11-36; see also in the same case the re Decision on Joint Challenge to jurisdiction, §§67-179.

It is striking that in this area there has been an inversion of the normal process whereby states first develop an international rule binding upon them, namely an interstate rule imposing a certain behaviour, and then this rule gradually evolves as a penal rule criminalizing any conduct contrary to the standards imposed by the interstate rule (see above, 1.2 at point 4). In this case there first emerged a criminal law rule (admittedly based on a general principle of IHL concerning 'responsible command') that addressed itself to individuals (military commanders or civilian or political leaders); then a written rule was agreed upon by states imposing on them to see to it that their commanders prevent or repress crimes by their subordinates. This is Article 87 of the First Additional Protocol, which is addressed to the Contracting parties and to the Parties to a conflict, and spells out as well as codifies the principle on responsible command mentioned above.¹⁶⁸ This rule is accompanied by Article 86 of the same Protocol, which in S2 restates the customary criminal law rule.

As noted above, this class of responsibility is different from the others considered so far, in that it is responsibility by omission: the person is criminally liable not for an act he has performed, but for failure to perform an act required by international law. In other words, he is responsible for the breach of an international obligation incumbent upon any commander or superior authority, to prevent or suppress crimes by subordinates.¹⁶⁹

¹⁶⁸ "The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches of the Conventions or of this Protocol which result from a failure to act under a duty to do so.

¹⁶⁹ According to the ICTY AC in *Detaliu and others (Af)* (§240) there is no duty, incumbent upon military or civilian authorities, to ascertain that their subordinates are not committing crimes. This proposition is questionable, in light of the abundant case law on the matter, as well as some clear treaty provisions and provisions of important Military Manuals. With regard to international rules, it may suffice to mention Article 87 of the First Additional Protocol of 1977, on 'Duty of commanders'. The obligation in question is clearly set out in many national Military Manuals, for instance, those of Switzerland, *Règlement* (1987), Article 19b ('Les commandants doivent informer la troupe de ses obligations aux termes des Conventions, Ils sont responsables du fait que leurs troupes respectent les Conventions et de punir d'éventuelles infractions'); Russia's Military Manual (1990), Part VII, §§a and b (commanders of all grades must 'call to account persons who committed violations of the rules of international humanitarian law defined by Articles 85-7 of the First Additional Protocol'); Germany, Military Manual (1992), ch. I, no. 138; New Zealand, Military Manual (1992), ch. 16, s. 2, §1603-2 (It is incumbent upon a commanding officer to ensure that the forces under his command behave in a manner consistent with the laws and customs of war [...] and it is part of his responsibility to ensure that the troops under his command are aware of their obligations'); Australia, Defence Force Manual (1994), §1304 ('Military commanders of all Services and at all levels bear responsibility for ensuring that forces under their control comply with the Law of Armed

3.2 CRIMINAL CATEGORIES INTO WHICH THE GENERAL NOTION MAY BE SUBDIVIDED

International rules tend to lump together various classes of superior responsibility, without drawing any distinction. This, for instance, holds true both for Articles 7(3) and 6(3) of the Statutes of the ICTY and ICTR, respectively and for Article 28 of the ICC Statute. These provisions are essentially of a descriptive nature, in that they indicate the prohibited conduct by enumerating the various forms this conduct may take. They do not, however, differentiate between the various categories of liability that can be logically identified, nor do they attach any legal relevance to conduct falling under one particular category rather than another.

Nonetheless, it is both logically appropriate and also relevant for the practical purposes of sentencing to draw a distinction between different classes. It is not sound, for instance, to hold that a commander who fails to punish subordinates who previously, unbeknown to him, have perpetrated acts of genocide, is responsible for genocide, if only as an accomplice. Plainly, in this case the requisite conduct and the mens rea of the superior are neatly different from those required for the perpetrators of genocide, or for persons aiding and abetting genocide. Only when the superior in some way knows of the crime being or about to be perpetrated and willingly fails to check or prevent its commission, may he be deemed to participate in some way in the crime (according to some

Conflict'); Benin, Military Manual (1995), ch. V ('Chaque chef militaire est responsable du respect du droit de la guerre dans sa sphere de commandement [...] il est particulierement responsable de l'instruction du droit de la guerre afin de communiquer a sa troupe un comportement conforme au droit*'); Canada, Law of Armed Conflict Manual (1999), at 15-1 and 16-1 ('Commanders have responsibility to ensure that forces under their command are aware of their responsibilities'); and France, Manual on the Law of Armed Conflict (2001), Introduction, at 14, para. 7 ('Le commandement [...] doit s'assurer que les membres des forces armees connaissent leurs droits et appliquent les obligations qui en sont le parallele. Il est a ce titre responsable de leur instruction').

As for case law, one may recall, in addition to Yamashita (see *supra*, 11.4.1), the instructions a Judge Advocate issued to a US Court Martial in Medina, he stated: In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties as assigned by him. In other words, after taking action and issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation' (1732).

commentators, as a co-perpetrator or accomplice), for in this case there is a clear nexus of causality between the superior's omission and the crime.

This approach, which seems logically and theoretically correct and also consonant with general principles of justice (because of its consequences at the level of sentencing), leads to distinguishing three categories:

1. A commander or superior breaches his duty to prevent his subordinates from engaging in criminal conduct. He knows that an offence is about to be, or is being, committed by his subordinates and willingly fails to stop the crime. In this case, the superior has knowledge of the crime and its omission is deliberate (intent).

According to one view the offender should be legally treated as a co-perpetrator, although the crimes are physically committed by the subordinates, or at least as an accomplice. In a way the superior participates in the crime, for if he had acted to stop it, the delinquency would not have been perpetrated. There is therefore a causal link between the superior's attitude and the commission of crimes. Arguably this view was reflected to some extent not only in the French and Chinese laws mentioned above, and in Araki and others (Tokyo trial), at 30-1, but also in the German Law on Crimes against International Law (Section 4).¹⁷⁰

Under a different view (that would seem to be reflected in e.g. Halilovic, TJ, §54; Hadzihasanovic and Kubura, T), §75), the superior is responsible for violating his own duty to prevent or stop misconduct by his subordinates; both the objective and the subjective elements of his crime are different from those of the subordinates. For instance, if the underlings have committed large-scale rape within a context of systematic attack on civilians, the conduct (sexual assault) and the mens rea (intent to sexually abuse a civilian in a grave manner, plus awareness of the systematic nature of the attack on civilians) are different from

¹⁷⁰ Section 4(1) of the Code provides that the commander 'shall be punished in the same way as the perpetrator of the offence committed by [the] subordinate'. And the Explanatory Memorandum of the German Government states that 'from a theoretical viewpoint' 'the negligence' of the superior 'could be classified as mere complicity' (at 39).

those of the commander, who may be accused of failure to act (conduct) with knowledge that crimes were being or were about to be perpetrated, and intent not to stop or forestall them. True, the subjective and objective elements of the criminal offence attributable to the superior are not far from those of aiding and abetting: in both cases the person other than the perpetrator does not share the criminal intent of the perpetrator, but knows the crime that the perpetrator is committing or will commit, and in both cases the person at issue provides assistance to the perpetrator (in the case under discussion by not preventing the commission of his crimes). Nevertheless, the fact remains that the aider and abettor, by his action or omission, intends to further the act of the perpetrator, and this element must be proved by the prosecution; instead, in the case of command responsibility that intent is not a legal requirement, and consequently need not be proved in court, although it may happen that the commander by his inaction aimed in fact at furthering the crime of the subordinate. Therefore, although for sentencing purposes the conduct of the superior may be as blameworthy as that of the subordinates, the legal ingredients of the crimes are different.¹⁷¹

2. A commander or a superior breaches his duty properly to supervise the conduct of his troops or underlings. He intentionally or negligently omits to monitor the actions of his subordinates, where he could have become cognizant of the imminent commission of the offence or of the fact that the offence was being committed, and therefore prevented it. Here the superior does not know that the subordinate is about to commit or is committing a crime: he lacks knowledge. However, his failure to know derives from his negligent or deliberate breach of his duty of supervision, with the consequence that he does not impede the perpetration of crimes that he could foresee and avoid. In these cases the offence imputable to the superior is arguably different from and less serious than

¹⁷¹ In *Hadzihasanovic and Kubura*, the TC held that there must be a link or nexus between the superior's omission and the crimes in the sense that the superior's 'omission created or heightened a real and reasonably foreseeable risk that those crimes would be committed, a risk he accepted willingly', a risk that 'materialised in the commission of those crimes. In that sense, the superior has substantially played a part in the commission of those crimes. (...] it is presumed that there is such a nexus between the superiors' omission and those crimes' (TJ, §§193).

that perpetrated by the subordinate, in that it rarely consists of the deliberate or negligent dereliction of supervisory duties.¹⁷²

However, a different view is also admissible, although it is arguably less persuasive. One can contend that failure by the superior to exercise his duty of supervision has a causal link with the crime, in that by breaching his supervisory duty he has in some way contributed to bringing about the offence. In other words, the superior's conduct may be considered as serious as that of the subordinate; the former could therefore be punished by a sentence similar to that of the subordinate.

3. A superior breaches his duty to report to the appropriate authorities crimes committed by his subordinates unbeknownst to him. Here the superior knows that a crime has been perpetrated and fails immediately to draw the attention of the body responsible for the investigation or prosecution of the crime. In this case, the superior is liable to be punished for the specific crime of failure to report. His offence is plainly different from that of his subordinates: he is responsible if, upon becoming cognizant of the crimes of his subordinates, he deliberately or with culpable negligence fails to report them to the appropriate authorities for punishment. Here the superior's conduct may not be held to have caused, or contributed to cause, the criminal offence.¹⁷³

¹⁷² With respect to the supervisory duties of a commander, the holding of the US Military Tribunal in Wilhelm List and others (Hostage case) is instructive. Since the defence of List (commander in chief of the German armed forces in 1941-2), had alleged that he had no knowledge of the killings of civilians in occupied territory, the Tribunal noted the following: 'A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence' (1271; emphasis added).

¹⁷³ The various categories are instead merged in Toyoda. The Tribunal stated the following: "The Tribunal considers the essential elements of command responsibility for atrocities of any commander to be; 1. That offenses, commonly recognized as atrocities, were committed by troops of his command; 2. The ordering of such atrocities. In the absence of proof beyond a reasonable doubt of the issuance of orders, then the essential elements of command responsibility are: 1. As before, that atrocities were actually committed; 2. Notice of the commission thereof. This notice may be either: a. Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; b. Constructive; that is the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and

In a case brought before the ICTY (Hadzihasanovic, Alagic and Kubura) the AC dismissed the proposition (upheld instead by the TC: Decision on joint Challenge to Jurisdiction, §§197-202) that a commander may also be responsible for failure to report crimes committed before he took command of the relevant unit. The main reason for this holding is that there is no practice or *opinio juris* to support the proposition (Decision on IA Challenging Jurisdiction in Relation to Command Responsibility, §§37-56). It would seem instead that the proposition is correct (as was rightly opined by Judges Hunt and Shahabuddeen in their dissenting opinions appended to the decision of the AC). It is not necessary to search for a specific customary rule on the matter. The duty to report follows, as in the case of crimes committed by the underlings while the commander was in control, from the general principles on superior responsibility set out by the AC in the same case (see §§12-18). If international law imposes on a military commander the obligation to report to the appropriate authorities any crime committed by his subordinates, clearly this obligation applies whether or not the crimes have been committed when he was the commander. The purpose of the obligation incumbent upon any person in a position of command to make his subordinates criminally accountable is twofold: (i) to ensure military discipline and respect for IHL; and (ii) to avoid the troops interpreting any inaction by the superior as an implicit approval of their misconduct. It does not matter at all whether the crimes were perpetrated when he was in control of the troops or prior to that date: this circumstance is immaterial to the fulfillment of the obligation. The contrary view is based on a misapprehension of the various categories of command responsibility

acknowledged routine for their commission. 3. Power of command; that is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders. 4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations of the laws of war. 5. Failure to punish offenders. In the simplest language it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished' (5005-6).

In BagHishema the ICTR AC rightly insisted on the fact that the information about the crimes must be specific, namely specifically related to the crimes by subordinates. It stated that it was necessary 'to make a distinction between the fact that the Accused had information about the general situation that prevailed in Rwanda at the time, and the fact that he had in his possession general information which put him on notice that his subordinates might commit crimes' (§42). See also Krnojelac, T), §§312-13, A1, §§165-71.

and the fact that 'failure to report' is a 'distinct category from the others, where the breach lies in a dereliction of the duty to inform other authorities of the crimes so that they take action to punish the perpetrators. In addition, as Judge Shahabuddeen rightly emphasized in his dissenting opinion (§14), one of the consequences of the AC ruling is that the subordinates' crimes may go unpunished: if the crimes were committed 'shortly before the assumption of duty of the new commander—possibly, the day before, when all those in previous command authority disappeared', and were not reported by the then commander, and the new commander were not obliged to report them even if he knows that the crimes were committed, the crimes would not be punished by anyone. This would clearly be contrary to the notion that superiors are legally bound to make their subordinates criminally accountable.

3.3 GENERAL CONDITIONS OF SUPERIOR RESPONSIBILITY

Before trying to identify the mental element required for each of these three categories, it may be helpful to set out the general conditions required for all these categories. Superior authorities, whether military or civilian, bear responsibility for crimes committed by their subordinates if the following cumulative conditions are met:

1. Commission of international crimes by troops or other subordinates. It is not necessary for the troops or the other subordinates to have physically perpetrated the crimes. They may have engaged in criminal conduct under any head of liability, namely perpetration, co-perpetration, aiding and abetting, joint criminal enterprise to commit crimes, etc.¹⁷⁴

2. Effective command and control over the subordinates. It is not necessary for there to be a formal hierarchical structure. Individuals in positions of authority, whether within civilian or military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their de facto or

¹⁷⁴ See ICTY, *Boskffvskiand Tarlulovski*, TC, Decision on the Proserutioni Motion to Amend the Indictment §§18-20; One, TL 297-8.

dejure position as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility.¹⁷⁵

Control must be effective. Thus in *von Weizsacker and others* (Ministries case) a US Military Tribunal sitting at Nuremberg held that the mere appearance of an official's name on a distribution list attached to an official document could only provide evidence that it was intended that he be provided with the relevant information, and not that 'those whose names appear on such distribution lists have responsibility for, or power and right of decision with respect to the subject-matter of such document' (at 693).¹⁷⁶ In *Blaskic* an ICTY TC held that 'what counts is his material ability [of a superior to control the subordinate], which instead of issuing orders or taking disciplinary actions may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken' (§302). In *Kordic and Cerkez* an ICTY TC provided some important examples.¹⁷⁷ And in *Cappellim and others* the Milan Court of Cassation held that a superior who in fact had been deprived of his authority, although he still was formally vested with his position, could not be held responsible for crimes perpetrated by his subordinates unbeknownst to him or even in breach of his orders, for lack of the required intent (at 86-7).

¹⁷⁵ *Delalic and others* (T), 55377-8). AI (§§197-8); *Kordic and Cerkez* (T), 11405-7).

¹⁷⁶ See, e.g., *Delalic and others*, §354-78; *Delalic and others* (Appeal), 19192-5; *Blaskic*, §§295-303; *Kordic and Cerkez*, §§405-171.

¹⁷⁷ It should be stated that: 'For instance, a government official who knows that civilians are used to perform forced labour or as human shields will be held liable only if it is demonstrated that he has effective control over the persons who are subjecting the civilians to such treatment. A showing that the official merely was generally an influential person will not be sufficient. In contrast, a government official specifically in charge of the treatment of prisoners used for forced labour or as human shields, as well as a military commander in command of formations which are holding the prisoners, may be held liable on the basis of superior responsibility because of the existence of a chain of command' (§415). In addition, with reference to civilian authorities, the same TC stated in the same case: 'Evidence that an accused is perceived as having a high public profile, manifested through public appearances and statements, and thus as exercising some authority, may be relevant to the overall assessment of his actual authority although not sufficient in itself to establish it, without evidence of the accused's overall behaviour towards subordinates and his duties. Similarly, the participation of an accused in high-profile international negotiations would not be necessary in itself to demonstrate superior authority. While in the case of military commanders, the evidence of external observers such as international monitoring or humanitarian personnel may be relied upon, in the case of civilian leaders evidence of perceived authority may not be sufficient, as it may be indicative of mere powers of influence in the absence of a subordinate structure' (§424).

It bears noting that in *Kordic and Cerkez*, the TC found that one of the accused, Kordic, a civilian leader and politician having 'tremendous influence' and playing an important role in military matters, nevertheless did not possess the authority to prevent the crimes that were being committed, or to punish the perpetrators. It therefore acquitted the accused of charges involving command responsibility, while nonetheless convicting him of various offences on the basis of perpetration under Article 7(1) of the Statute (§§838-41).

A question that can also arise is how effective the control over subordinates must be when crimes are perpetrated by irregular armies or rebel groups. The question was convincingly discussed by an SCSL TC in *Brima and others*.¹⁷⁸

Another question has arisen before international courts: whether commanders of a unit engaged in joint combat with other units may be held liable for acts of these other units formally not under their *de jure* command. In *Hadzihasanovic and Kubura* an ICTY TC held that 'mere participation in joint combat operations is not sufficient to find that commanders of different units exercise effective control over all participants in battle. Although such cooperation might be an indicator of effective control, it is appropriate to determine on a case-by-case basis what authority an accused commander actually had over the troops in question' (TI, §84).

3. Knowledge (or constructive knowledge, namely knowledge that can be inferred from or implied by the conduct of the persons involved, the surrounding

¹⁷⁸ According to the TC, in a conflict involving irregular armies or rebel groups, 'the traditional indicia of effective control provided in the jurisprudence may not be appropriate or useful' (§787). Such indicia include 'that the superior had first entitlement to the profits of war, such as looted property and natural resources; exercised control over the fate of vulnerable persons such as women and children; the superior had independent access to and/or control of the means to wage war, including arms and ammunition and communications equipment; the superior rewarded himself or herself with positions of power and influence; the superior had the capacity to intimidate subordinates into compliance and was willing to do so; the superior was protected by personal security guards, loyal to him or her, akin to a modern praetorian guard; the superior fuels or represents the ideology of the movement to which the subordinates adhere; and the superior interacts with external bodies or individuals on behalf of the group' (§788). The TC, however, conceded that the traditional indicia of control remain crucial, including the superior's power to issue orders and take disciplinary action (§789).

circumstances, etc.) or breach of the obligation to acquire knowledge. The superior knew, or had information which should have enabled him to conclude in the circumstances at the time, that crimes were about to be, or were being committed or had been committed. The superior is also criminally liable if, owing to the circumstances prevailing at the time, he should have known and consciously disregarded information indicating that his subordinates were going to commit (or were about to commit, or were committing, or had committed), international crimes. The case law has clarified that the superior need not know the exact identity of the subordinates, it being sufficient that he should know the 'category' of the subordinates engaging in criminal conduct (this can be inferred from the fact that this is what courts have required prosecutors to prove).¹⁷⁹

4. Failure to act. The superior failed to take the action necessary to prevent or repress the crimes, thereby breaching his duty to prevent or suppress crimes by his subordinates.

3.4 SPECIFICATION OF THE SUBJECTIVE ELEMENT IN THE VARIOUS CLASSES OF OMISSION

The objective element of the crime is apparent from what has just been set out. It is clear from the above that command responsibility, or responsibility by omission of superior authorities, is not a form of strict or objective liability; that is, liability for offences for which one may be convicted without any need to prove any form or modality of mens rea.¹⁸⁰ Even for this category of crimes a mental element is required.

First of all, one ought to distinguish between the mens rea required for the crimes perpetrated by the subordinates (normally intent, as in the case of killing of civilians, rape, use of unlawful weapons, torture, etc.) and that required for the

¹⁷⁹ Krnojelac decision on the defence motion on the formbf indictment, §46; Hadzihasanovic and Kubura, 17, §90.

¹⁸⁰ Recently ICTY Trial Chambers rightly took this view in Delalic and others. §239, and in Kordic and Cerkez, §369.

superior. This follows from the fact that in the case of superior responsibility the superior is criminally liable for his own culpability, which follows from his own breach of obligation;¹⁸¹ he is not responsible for the crimes committed by his subordinates, which may require a different *actus reus* and *mens rea*, although there may be a causal link between those crimes and the responsibility of the superior.

That law should admit for the superior a less culpable mental element as sufficient for his liability to arise (for instance, gross negligence instead of the intent required for the subordinates), is justified by his hierarchical position, the obligation attendant upon this position to control the subordinates and ensure that they comply with the law of international armed conflict, and the consequent need to make him accountable for the conduct of his subordinates.

It would seem that intent is not always required for the superior to be held criminally liable.¹⁸² Rather, one should distinguish various situations:

1. The superior knows that crimes are about to be committed or are being committed by his subordinates and nonetheless takes no action. Here international rules require for culpability (i) knowledge, that is awareness that the crimes are being or are about to be committed;¹⁸³ and (ii) intent, that is the will not to act or, in other words, the conscious decision to refrain from preventing or stopping the crimes of the subordinates (this intent is clearly different from that

¹⁸¹ Halitavic, Tf, S54; Hadithasanoncand Kubura, TJ, §75.

¹⁸² In *Baba Masao*, the judge Advocate summed up the law for the Australian Military Court trying the case: 'In order to succeed [in proving charges of command responsibility] the prosecution must prove [...] that war crimes were committed as a result of the accused's (Commanding General of the [apanese Army in Borneo] failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or wilfully disregarding them, not caring whether this resulted in the commission of a war crime or not' (at 207).

¹⁸³ In *Maltauro and others* the Court of Assize of Milan held in 1952 that the head of police, being cognizant of the massacre that was about to be carried out by partisans, failed to prevent it. He was therefore held responsible as a co-perpetrator of the massacre (at 176-7). The massacre took place in a prison where numerous fascists, previously arrested by partisans on 28 April 1945 (the day when Schio, the small town in northern Italy, had been liberated), were being held. See also *Sumida Haruzo and others* (at 260-1).

required for such crimes of the subordinates as murder, torture, rape, etc., as well as the further subjective ingredient of crimes against humanity, if any, namely awareness of the existence of a widespread or systematic practice).¹⁸⁴

2. The superior has information which should enable him to conclude in the circumstances at the time that crimes are being or will be committed, and fails to act, in breach of his supervisory duties.¹⁸⁵ Or he does not pay attention to reports concerning crimes about to be committed or being perpetrated by subordinates, and consequently fails to prevent or stop those crimes. Here either recklessness or gross or culpable negligence (*culpa gravis*) may be held sufficient. The former mental element consists of awareness that failure to prevent the action of subordinates risks bringing about certain harmful consequences (commission of the crimes), and nevertheless ignoring this risk.¹⁸⁶ The latter state of mind, as pointed out above (3.8), may be found when: (i) the commander is required to abide by certain standards of conduct or to take certain specific precautions (for example, to request reports on the conduct of his underlings, or to exact that reports submitted to him be more accurate and specific); in addition (ii) he

¹⁸⁴ See, for instance, Cappellini and others (at 86-7), Leoni (Milan Court of Cassation, decision of 31 July 1945, at 128), Bonini (Court of Cassation, decision of 3 March 1948, at 1137-8), Tabellini (Rome Military Tribunal, decision of 6 August 1945, at 394-8). This last case is particularly interesting: the defendant was a colonel of the Carabinieri, accused of having allowed, in October 1943, at the request of the German occupying forces, the disarming and transfer of the Carabinieri stationed in Rome to Northern Italy; they had been subsequently deported to Germany and detained in concentration camps. The Court found that the defendant was not guilty of failure to prevent the commission of a crime. He was not aware of the real reasons for the transfer and believed that it was done in the exercise of the Occupant's power to transfer civil servants and police forces; according to the Court 'he lacked the requisite intent, because he carried out the execution of the order believing that such order was not inconsistent with his duties and those of the police forces to which he belonged, pursuant to international law' (at 398).

¹⁸⁵ According to Delalic and others, this is the case when the commander or the superior authority 'had in his possession information of a nature, which at least, would put him on notice of the risk of such offences [by his subordinates] by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates' (§383).

¹⁸⁶ 37 In *Xotomi Suelo and others* a Temporary Court Martial in the Netherlands East Indies, in dealing with the responsibility of the commander of a prisoner of war camp in Celebes, held in 1947 that: 'Even though a particular act had been neither ordered nor condoned by a superior, who might even [have] been unaware of it, he must nevertheless be held responsible for the outrages of those under his command, on the ground that as a Commander he was bound to prevent their occurrence, the more so as he could reasonably foresee that they would be committed' (at 209).

contemplates the risk of harm and nevertheless takes it, for he believes that the risk will not materialize.¹⁸⁷ It should be clear that a conviction for command responsibility can only be predicated on gross negligence; that is, if the military or civilian commanders conduct glaringly falls short of the standard set by the reasonably prudent and competent commander test.

3. The superior should have known that crimes were being or had been committed. Here again gross or culpable negligence (*culpa gravis*) is sufficient.¹⁸⁸

¹⁸⁷ In *Sumida Haruzo* and *J. others* the Prosecutor stated that, 'with respect to the torture inflicted by the members of his unit [on the prisoners], this may be attributed to his [of Sumida Haruzo] neglect in exercising sufficient supervision, and he may, as a result, be condemned on a charge arising out of responsibility for supervision, which is entirely different from being condemned on criminal responsibility' (at 235). In *Delalic* and *others* the ICTY AC upheld the interpretation given by the TC to the standard 'had reason to know': that is, 'a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment' (§241). The AC specified, however, that the information available to the commander 'may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system'. Furthermore, this information 'does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge' (§238). See also *BagHishema*, A; (ICTR), §28; *Krnjadic*, A, at §59; *Blaikic*, AJ, §62.

¹⁸⁸ In *Rochling* and *others* a French court stated that the lack of knowledge' alleged by the defendant was culpable because he had the authority to stop the odious practices to which forced labourers were subjected and instead showed utter indifference to the plight of those labourers (at 8). In *Soemu Tffyoda* a US Military Commission held that the accused 'should have known, by use of reasonable diligence, the perpetration of atrocities by his troops' (at 5006). The Commission went on to point out that in determining the guilt or innocence of an accused, charged with dereliction of his duty as a commander, consideration must be given to many factors. The theory is simple, its application is not. (...) His guilt cannot be determined by whether he had operational command, administrative command, or both. If he knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties. Only the degree of his guilt would remain' (5008).

A Canadian Court Martial relied upon the notion of negligence in *Sergeant Boland*. The defendant had failed to prevent two subordinates from torturing and beating to death a Somali civilian taken prisoner (at 1075-8). See also *Medina* (cited above).

In *Delalic* and *others* an ICTY TC held that 'from a study of these decisions [of post World War II tribunals], the principle can be obtained that the absence of knowledge should not be considered a defence if, in the words of the Tokyo judgement, the superior was "at fault in having failed to acquire such knowledge"' (§388). In *Blaskic* an ICTY TC held that 'after World War II, a standard was established according to which a commander may be liable for crimes by his subordinates if "he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction"' (§322).

4. The superior becomes cognizant that crimes have been committed and fails to repress them by punishing the culprits. Here, knowledge and intent or culpable negligence would seem to be required for criminal liability.

3.5 GENERAL: VARIOUS CLASSES OF IMMUNITIES

One of the possible obstacles to prosecution for international crimes may be constituted by rules intended to protect the person accused by granting him immunity from prosecution.

There exist two categories of immunities that may in principle come into play and be relied upon.

1. Those accruing under international law. They may relate either to conduct of state agent? acting in their official capacity (so-called functional immunities), or protect the private life of the state official (personal immunities). The former immunities apply, on the strength of the so-called Act of State doctrine, to all state agents discharging their official duties. In principle, an individual performing acts on behalf of a sovereign state may not be called to account for any violations of international law he may have committed while acting in an official function. Only the state may be held responsible at the international level. The latter category of immunities (personal immunities) are granted by international customary or treaty rules to some categories of individuals on account of their functions and are intended to protect both their private and their public life, or in other words to render them inviolable while in office. Such individuals comprise Heads of State, prime ministers or foreign ministers, diplomatic agents, and high-ranking agents of international organizations. They enjoy these immunities so as to be able to discharge their official mission free from any impairment or interference. These immunities end with the cessation of the agent's official duties.

All these immunities may be invoked by a state official before foreign courts or other foreign organs (for example, enforcement agencies).

2. The immunities provided for in national legislation and normally granted to the Head of State, members of cabinet, and members of Parliament. They normally cover the acts of the individuals concerned and involve exemption from national jurisdiction. In addition, they also often include immunity from national prosecution for ordinary crimes having no link with the function and committed either before or during the exercise of the functions. However, such immunity terminates as soon as the functions come to an end, although normally the individual remains immune from jurisdiction for any official act performed during the discharge of his functions.

The rationale behind these national immunities is grounded in the principle of separation of powers and in particular the need to protect state officials (say, the Head of State) from interference by other state organs (say, courts) that could jeopardize their independence or political action.

All these categories of immunity normally apply to ordinary crimes. Do they also apply to international crimes? To answer this question one must of course establish whether there are international customary or treaty rules that cover this matter.

3.6 FUNCTIONAL AND PERSONAL IMMUNITIES PROVIDED FOR IN INTERNATIONAL CUSTOMARY LAW

Let us now return to and dwell upon an issue that is of great importance for our purposes: the distinction between two categories of immunities laid down in international law; that is, functional (or *ratione materiae* or organic) immunities and personal (or *ratione personae*) immunities. One ought always to distinguish between these two categories when discussing the question of, among other things, exemption from foreign jurisdiction.

The first category is grounded in the notion that states must respect other states' internal organization and may not therefore interfere with the structure of foreign states or the allegiance a state official may owe to his own state. Hence no state

agent is accountable to other states for acts undertaken in an official capacity and which therefore must be attributed to the state.

The second category is predicated on the need to avoid a foreign state either infringing sovereign prerogatives of states or interfering with the official functions of a state agent under the pretext of dealing with an exclusively private act (ne impediatur legatio, i.e. the immunities are granted to avoid obstacles to the discharge of diplomatic functions).

This distinction, based on state practice¹⁸⁹ as well as some recent judicial decisions¹⁹⁰ is important. Organic or functional immunities: (i) relate to substantive law, that is, amount to a substantive defence (although the state agent is not exonerated from compliance with either international law or the substantive law of the foreign country—if he breaches national or international law, this violation is not legally imputable to him but to his state)¹⁹¹ (ii) cover official acts of any de jure or defacto state agent; (iii) do not cease at the end of the discharge of official functions by the state agent (the reason being that the act is legally attributed to the state, hence any legal liability for it may only be incurred by the state); (iv) are erga omnes, that is, may be invoked towards any other state.

¹⁸⁹ With regard to the first class of immunities, suffice it to refer to the famous McLwd incident and the Rainbow Warrior case. For the McLwd case, see British and Foreign Papers, vol. 29, at 1139, as well as Jennings, 'The Caroline and McLwd Cases', 32 A)IL (1938), 92-9; see also the decision of 1841 of the New York Supreme Court in *People v. McLeod*, at 270-99. For the Rainbow Warrior case, see UN Reports of International Arbitral Awards, XIX, at 213. See also the Governor Collot case, in J. B. Moore, A Digest of International Law, vol. II (Washington: Government Printing House, 1906), at 23.

¹⁹⁰ One can mention the judgment rendered by the Supreme Court of Israel in *Eichmann* (at 308-9), that handed down by the German Supreme Court (Bundesgerichtshof) in *Scotland Yard*, at 1101-2 (the Director of Scotland Yard was not amenable to German civil jurisdiction for he had acted as a state agent). See also the judgment delivered by the ICTY AC in *Blaskic* (subpoena) (at §§38 and 41). For other cases see in particular M. Bothe, 'Die strafrechtliche Immunität fremder Staatsorgane', in 31 Zeit. Ausl. Off. Recht Volk (1971), at 248-53.

¹⁹¹ Nevertheless, it would seem that if the state official acting abroad has breached criminal rules of the foreign state, he may incur criminal liability and be liable under foreign criminal jurisdiction (at least, this is what happened both in *McLeod* and in the *Rainbow Warrior* case). Be that as it may, it seems certain, however, that the state official in question will not in any case be asked to pay for any damage his act may have caused. The state for which he acted remains internationally responsible for that act and will have to bear all the legal consequences of such responsibility.

In contrast, personal immunities', (i) relate to procedural law, that is, they render the state official immune from civil or criminal jurisdiction (a procedural defence); (ii) cover official or private acts carried out by the state agent while in office, as well as private or official acts performed prior to taking office; in other words, they assure total inviolability; (iii) are intended to protect only some categories of state officials, namely diplomatic agents, Heads of State, heads of government, foreign ministers (under the doctrine set out by the International Court of Justice in its judgment in the Case Concerning the Arrest Warrant of 11 April 2000, at §§51-5); (iv) come to an end- after cessation of the official functions of the state agent; (v) may not be erga omnes (in the case of diplomatic agents they are only applicable with regard to acts performed as between the receiving and the sending state, plus third states through whose territory the diplomat may pass while proceeding to take up, or to return to, his post, or when returning to his own country: so-called *jus transitus innoxii*, i.e. the right to move from one place to another without hindrance).

The above distinction permits us to realize that the two classes of immunity coexist and somewhat overlap as long as a state official who may also invoke personal or diplomatic immunities is in office. While he is discharging his official functions, he always enjoys personal immunity.¹⁹² In addition, he enjoys functional immunity, subject to one exception that we shall see shortly, namely in the case of perpetration of international crimes. Nonetheless, the personal immunity prevails even in the case of the alleged commission of international crimes, with the consequence that the state official may be prosecuted for such crimes only after leaving office.

3.7 THE CUSTOMARY RULE LIFTING FUNCTIONAL IMMUNITIES WITH RESPECT TO INTERNATIONAL CRIMES

¹⁹² For a recent departure from this rule, see the 2002 decisions of the European Union concerning the freezing of the private assets of Mugabe (head of state in Zimbabwe): see Council Common Position of 18 February 2002 concerning restrictive measures against Zimbabwe (2002/145/CFSP), in Official journal of the European Communities, 21.32.2002, L50/1; Council Regulation (EC) No. 310/2002 of 18 February 2002 on the same matter, *ibid.*, L50/4; Council Common Position of 22 July 2002 amending Common Position 2002/145/CFSP, *ibid.*, L195/1; Commission Regulation no. 1643/2002 of 13 September 2002, *ibid.*, L247/22; and Council decision of 14 September 2002 implementing Common Position 2002/145/CFSP, *ibid.*, L247/56.

(A) THE QUESTION OF IMMUNITY FROM PROSECUTION

The traditional rule whereby senior state officials may not be held accountable for acts performed in the discharge of their official duties was significantly undermined after the Second World War, when international treaties and judicial decisions upheld the principle that this 'shield' no longer protects those senior state officials accused of war crimes, crimes against peace, or crimes against humanity. More recently, this principle has been extended to torture and other international crimes.

It seems indisputable that by now an international general rule has evolved on the matter. Initially this rule only applied to war crimes and covered any member of the military of belligerent states, whatever their rank and position. When the major provisions of the London Agreement of 8 August 1945 (setting forth the Statute of the IMT) gradually turned into customary law, Article 7 ('The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment') has also come to acquire the status of a customary international rule.

National case law proves the existence of such a rule. Many cases where state military officials were brought to trial demonstrate that state agents accused of war crimes, crimes against humanity, or genocide may not invoke before national courts their official capacity as a valid defence. Even if we leave aside cases where tribunals adjudicated on the strength of international treaties or Control Council Law no. 10, a string of significant judgments where courts applied national law should be mentioned.¹⁹³ Admittedly, in most of these cases the

¹⁹³ One may recall, for instance, Eichmann in Israel (at 277-342), Barbie in France (see the various judgments in 78 ILR, 125ff, and 100 ILR 331ff), Kappler (193-9), and Priebke in Italy (959ff). Router (526-48), Albrecht (747-51), and Bouterse in the Netherlands (Amsterdam Court of Appeal), Kesserling (9ff) before a British Military Court sitting in Venice, and von Lewinski (called von Manstein) before a British Military Court in Hamburg (523-4), Pinochet in the UK (see *infra*, n. 7), Yamafita in the USA (1599ff), Buhler before the Supreme National Tribunal of Poland (682), Pinochet and Scilingo in Spain (at 4-8 and 2-8, respectively), and Miguel Cavallo in Mexico (by Judge Jesus Guadalupe Luna authorizing the extradition of Ricardo Miguel Cavallo to Spain).

accused did not challenge the court's jurisdiction on the ground that he had acted as a state official. The fact remains, however, that the courts did pronounce on acts performed by those officials in the exercise of their functions. The defendants' failure to raise the 'defence' of acting on behalf of their state shows that they were aware that such defence would have been of no avail. In addition, in some cases the defendant did plead that he had acted in his official capacity and hence was immune from prosecution. This, for example, happened in *Eichmann*, where the accused raised the question of 'Act of State'. Although the Court used that terminology, which could be misleading, in essence it took the right approach to the question at issue and explicitly held that state agents acting in their official capacity may not be immune from criminal liability if they commit international crimes (at 309-12).

It can also be conceded that most of the cases under discussion deal with military officers. However, it would be untenable to infer from that fact that the customary rule only applies to such persons. It would indeed be odd that a customary rule should have evolved only with regard to members of the military and not for all state agents who commit international crimes.

Besides, it is notable that the Supreme Court of Israel in *Eichmann* (at 311) and more recently various Trial Chambers of the ICTY have held that the provisions of, respectively, Article 7 of the Charter of the IMT at Nuremberg and Article 7(2) of the Statute of the ICTY (both of which relate to any person accused of one of the crimes provided for in the respective Statutes) 'reflect a rule of customary international law'.¹⁹⁴ In 2002 in *Letkolfnf. Soedjarwo* the Indonesian Ad Hoc Court on Human Rights held that the relevant provision of the ICC Statute has 'developed' into 'a legal principle' (at 23). Furthermore, Lords Millet and Phillips of *Worth Matravers* in the House of Lords' decision of 24 March 1999 in *Pinochet* took the view, with regard to any senior state agent, that functional immunity

¹⁹⁴ See *Karadzic and others* (§24), *Furundzija* (§140), and *Slobodan Milosevic* (decision on preliminary motions) (§28)

cannot excuse international crimes.¹⁹⁵ The ICTY Appeals Chamber had already set out this legal proposition in *Blaikic* (subpoena) (§41) (see also SCSL, TC, *Taylor* (Decision on the immunity from prosecution), §§52-3).

In addition, important national Military Manuals, for instance those issued in 1956 in the USA and in 1958 (and then in 2004) in the UK,¹⁹⁶ expressly provide that the fact that a person who has committed an international crime was acting as a government official (and not only as a serviceman) does not constitute an available defence.

It is also significant that, at least with regard to one of the crimes at issue, genocide, the ICJ implicitly admitted that under customary law official status does not relieve responsibility (see *Reservations to the Convention on Genocide*, at 24).¹⁹⁷

¹⁹⁵ See at 171-9 (Lord Millet) and 186-90 (Lord Phillips of Worth Matravers). Instead, according to Lord Hope (at 152), Pinochet lost his immunity *ratione materiae* only because of Chile's ratification of the Torture Convention. In other words, for him the unavailability of functional immunity did not derive from customary law; it stemmed from treaty law.

¹⁹⁶ See the US Department of the Army Field Manual, *The Law of Land Warfare* (July 1956), §§498 and 510. See also the British manual, *The Law of War on Land* (1958), at §632 and the 2004 Manual of the Law of Armed Conflict (UK Ministry of Defence, London: Oxford University Press, 2004), at 16.38.1. ('Heads of State and their ministers are not immune from prosecution and punishment for war crimes. Their liability is governed by the same principles as those governing the responsibility of civilian authorities').

¹⁹⁷ One should also recall that on 11 December 1946 the UN General Assembly unanimously adopted Resolution 95, whereby it 'affirmed' 'the principles recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'. These principles include Principle III as formulated in 1950 by the UN International Law Commission. This Principle provides as follows: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.' See YILC (1950-11), 192. All the Nuremberg Principles, Israel's Supreme Court noted in *Eichmann*, 'have become part of the law of nations and must be regarded as having been rooted in it also in the past' (at 311). It is notable that the UN SG took the same view of the customary status of the Genocide Convention (or, more accurately, of the substantive principles it lays down), a view that was endorsed implicitly by the UN Security Council (see Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, W) and explicitly by a TC of the ICTR in *Akayesu* (§495) and of the ICTY in *Krstic* (§541).

A further element supporting the existence of a customary rule having a general purport can be found in the pleadings made by the two states (the Congo and Belgium) that were in dispute before the International Court of Justice in the aforementioned Case Concerning the Arrest Warrant of 11 April 2000. In its Memoire of 15 May 2001, the Congo explicitly admitted the existence of a principle of ICL, whereby the official status of a state agent cannot exonerate him from individual responsibility for crimes committed

Arguably, while each of these elements of practice, on its own, cannot be regarded as indicative of the crystallization of a customary rule, taken together they may be deemed to evidence the formation of such a rule (a rule, it should be added, on whose existence legal commentators seem to agree, although admittedly without producing compelling evidence concerning state or judicial practice,¹⁹⁸ and which the Institut de droit international recently restated, at least with regard to Heads of State or government).¹⁹⁹

Let me emphasize that the logic behind this rule, which was forcefully set out as early as 1945 by justice Robert H. Jackson in his Report to the US President on the works for the prosecution of major German war criminals,²⁰⁰ is in line with present day trends in international law. Today, more so than in the past, it is state officials, and in particular senior officials, that commit international crimes. Most of the time they do not perpetrate crimes directly. They order, plan, instigate, organize, aid and abet, or culpably tolerate or acquiesce, or willingly or negligently fail to prevent or punish international crimes. This is why 'superior responsibility' has acquired such importance since Yamashita (1946) (see above,

while in office; the Congo also added that on this point there was no disagreement with Belgium (Memoire, at 39, §60).

¹⁹⁸ See, e.g., S. Glaser, 'L'Acied' Etatetle probleme de laresponsabilite individuelle', fievue de riroitpenflefrie criminologie (1950), Iff.; S. Glaser, Introduction, 71-6; M. Bothe, supra n. 2,254-7; Y. Dinstein, International Criminal Law', 5 IYHR (1975), 82-3; A. Bianchi, Immunity versus Human Rights; The Pinochet Case', 10 EJIL (1999), 269-70.

¹⁹⁹ See the Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law' adopted at the Session of Vancouver (August 2001), Article 13(2).

²⁰⁰ In his Report to the US President of 6 June 1945, Justice R. H. Jackson (who had been appointed by President Roosevelt as 'Chief Counsel for the United States in prosecuting the principal Axis War Criminals') illustrated as follows the first draft of Article 7 of the London Agreement (whereby 'The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment'), contained in a US memorandum presented at San Francisco on 30 April 1945: 'Nor should such a defence be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Justice Coke, who proclaimed that even a King is still "under God and the law" ' (in International Conference on Military Trials, 47).

11.4). To allow these state agents to go scot-free only because they acted in an official capacity, except in the few cases where an international criminal tribunal has been established or an international treaty is applicable, would mean to bow to traditional concerns of the international community (chiefly, respect for state sovereignty). In the present international community respect for human rights and the demand that justice be done whenever human rights have been seriously and massively put in jeopardy, override the traditional principle of respect for state sovereignty. The new thrust towards protection of human dignity has shattered the shield that traditionally protected state agents.²⁰¹

(B) THE QUESTION OF EXEMPTION FROM THE DUTY TO ASSIST COURTS

An important issue related to that we have just discussed is the extent to which the current removal of state officials' immunity from prosecution for international crimes also sets aside their right not to appear before an international court to testify, or at any rate to assist the court. To put it differently, may a state official that an international criminal court, through the issuance of a binding order or subpoena, has ordered to appear before the court either to give testimony or to deliver probative material, refuse to do so? Or is he instead legally bound to comply with the order? Clearly, the question does not turn on answering for international crimes, but on giving or handing over evidence about crimes committed by others. In *Blaskic* (subpoena) Croatia contended that under international law the ICTY was not allowed to issue binding orders to state organs acting in their official capacity; hence it asked the AC to quash the subpoena *daces teucum* (a judicial injunction to hand over evidence, accompanied by a threat of penalty in case of non-compliance) issued by an ICTY TC to the Croatian defence Minister, which ordered him to produce military

²⁰¹ A recent deviation from the rule should, however, be stressed. In 2007, in *Ibrakim Matar and others v. Avraham Dichter*, the US District Court for the Southern District of New York dismissed a civil action brought before US courts under the Alien Torts Statute against a former Israeli agent who, in his capacity as head of the Shin Beth, had allegedly authorized, planned, and directed the bombing on 22 July 2002 of an apartment building in Gaza City housing a Palestinian terrorist (the bombing caused many deaths and other casualties among civilians, and was termed in the petition a war crime). The US District Court, applying the US Foreign Sovereign Immunities Act, held that that action was covered by immunity (at 4-15).

documents or, alternatively, appear before the Chamber to show cause of non-compliance with the order. The TC relied upon Article 18(2) of the ICTY Statute, which grants the Prosecutor express authority to deal with state authorities and therefore implies, according to the TC, a general power of the Tribunal directly to 'approach' the relevant state officials. It consequently held that state officials could be directly addressed by the Tribunal by means of compelling orders (Blaskic, Decision on the Objection of Croatia to the Issuance of sub-poena duces tecum, §§67-9). The AC held instead that the general customary rule on functional immunities of state officials, though set aside by another customary rule where such officials are accused of international crimes, was still applicable when it came to the question of state cooperation with international criminal courts. These courts face states, so did the AC argue, and have therefore to address themselves to states, not to individual state officials, if they intend to order the production of documents, the seizure of evidence, etc. (§§42-3). The AC buttressed this legal argument by noting that in any case, were the state to refuse to deliver documents, the state official concerned would be bound by such refusal, and his appearing in court publicly to explain such refusal would serve little purpose (§44).

It would seem that the AC laid too much emphasis on state sovereignty and traditional international law. The contention is warranted that at present the expansion of the human rights doctrine and the thrust towards international criminal justice involve a significant erosion of traditional tenets. The duty of states to cooperate with international criminal courts that they have either voluntarily accepted or to which they are subjected on the strength of binding resolutions of the UN SC, entails that these courts are authorized to issue binding orders or subpoenas directly to state, officials (hence not through designated state channels), whenever they need the handing over of probative material necessary for the administration of justice. If the highest state authorities refuse to deliver the documents requested and consequently oblige the subpoenaed state official to behave accordingly, it is nevertheless important for such official to appear before the international court in order formally and publicly to set out the reasons for such refusal. Similarly, international criminal courts are

authorized to compel incumbent (and a fortiori former) state officials to testify in court, by issuing a subpoena ad testificandum. This is borne out by case law.²⁰²

3.8 INTERNATIONAL PERSONAL IMMUNITIES

(A) DO THEY INVOLVE IMMUNITY FROM PROSECUTION?

The problem of international personal immunities arises with regard to state officials accused of international crimes when they are abroad: may they be arrested and brought to trial for the alleged crimes? As we shall see, the problem can be differently framed and solved when the state official is in his own country; the question then arises whether under national (or international) law national courts are empowered to take proceedings against him.

The conflict between international rules granting personal immunities and the customary rules proscribing international crimes may be settled as indicated by the ICJ in its judgment in the Case Concerning the Arrest Warrant of 11 April 2000 (§§51-7). The Court logically inferred from the rationale behind the rules on personal immunities of such senior state officials as Heads of State or government (plus foreign ministers and diplomatic agents), that these immunities must perforce prevent any prejudice to the 'effective performance' of their functions. They therefore bar any possible interference with the official activity of such officials. It follows that an incumbent senior state agent (belonging to one of the categories mentioned above) is immune from jurisdiction, even when he is on a private visit or acts in a private capacity while holding office. Clearly, not only the arrest and prosecution of such a state agent while on a private visit abroad, but also the mere issuing of an arrest warrant, may seriously hamper or jeopardize the conduct of international affairs of the state for which that person acts.

²⁰² See *Krstić* (Decision on application for subpoenas) (ICTY, AI, §S23-8); *Milosevic* (Decision on application for interview and testimony of Tony Blair and Gerhard Schröder), (ICTY, A), §§12-33; and *Norman and others* (Decision on interlocutory appeal against Trial Chamber decision refusing to subpoena the President of Sierra Leone) (SCSL, AC, §§8-29). It should be noted that in the last two cases the court declined to issue the subpoena only because it held that the testimony of the dignitaries at issue was not material to the defence case.

In summary, even when accused of international crimes, the state agent entitled to personal immunities is inviolable and immune from prosecution on the strength of the international rules on such personal immunities. This proposition is supported by some case law (for instance, Pinochet²⁰³ in the UK and Fidel Castro²⁰⁴ in Spain, which 'relate to a former and an incumbent Head of State, respectively).

If the allegations about international crimes committed by foreign state officials are known before they enter a foreign territory, the territorial state may ask the foreign state official to refrain from setting foot in the territory; if that official is already on the territory, the state may declare him *persona non grata* and request him to leave forthwith.

Of course, it may be that an international treaty on specific international crimes implicitly or expressly prescribes that personal immunities may not relieve officials of responsibility for the international crimes they envisage. Many treaty rules, although couched in general terms, may be interpreted to this effect. On this score one can mention the Genocide Convention of 1948 (Article IV), the 1984 Convention on Torture (Article 4), as well as a number of treaties on terrorism. To these treaties one should add the Statutes of the ICTY and ICTR. Both contain a provision (respectively, Articles 7(2) and 6(2)), whereby "The official position of any accused person, whether as Head of State or Government or as responsible Government official, shall not relieve such person of criminal

²⁰³ See, e.g., the speech of Lord Browne-Wilkinson, in *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, judgment of 24 March 1999, at 112-15. See also the speeches of Lord Hope of Craighead, at 145-52, Lord Saville of Newdigate, at 169-70, Lord Millet, at 171-91, and Lord Phillips of Worth Matravers, at 181-90.

²⁰⁴ See Order (auto) of 4 March 1999 (no. 1999/2723). The Audiencia Nacional held that the Spanish Court could not exercise its criminal jurisdiction, as provided for in Article 23 of the Law on the Judicial Power, for the crimes attributed to Fidel Castro. He was an incumbent Head of State, and therefore the provisions of Article 23 could not be applied to him because they were not applicable to Heads of State, ambassadors, etc. in office, who thus enjoyed immunity from prosecution on the strength of international rules to which Article 21(2) of the same Law referred (this provision envisages an exception to the exercise of Spanish jurisdiction in the case of 'immunity from jurisdiction or execution provided for in rules of public international law'); see Legal Grounds nos 1-4. The Court also stated that its legal finding was not inconsistent with its ruling in Pinochet, because Pinochet was a former Head of State, and hence no longer enjoyed immunity from jurisdiction (see Legal Ground no. 5). For the (Spanish) text of the order, see the CD-Rom, EL DERECHO, 2002, Criminal case law.

responsibility nor mitigate punishment.' The strictness of this provision can be construed to the effect that it rules out the possibility of invoking personal immunities as a legal ground for not being prosecuted or tried.²⁰⁵ The same interpretation could be advanced with regard to the 1984 Convention on Torture, Articles 1-4 of which are so strict as to warrant such interpretation. However, the only treaty that explicitly excludes the right to rely upon personal immunities is the ICC Statute (Article 27(2)).

Certainly, there is still resistance to this trend favourable to lifting personal immunities in the case of international crimes. For example, in March 2000 the US State Department allowed a Peruvian alleged torturer to go free on the grounds that he enjoyed personal (that is, diplomatic) immunity.²⁰⁶

The question must nevertheless be raised as to whether a customary rule has evolved in the international community removing personal immunities for alleged international crimes, at last when jurisdiction over such crimes is granted to international criminal courts or tribunals. This question is not only theoretical, but also has a practical dimension. For instance, the STL, unlike the Statutes of other international criminal courts and tribunals referred to above, does not provide in terms for the lifting of the immunity under discussion. Can we nevertheless hold

²⁰⁵ Therefore, it would seem that one ought to reject as unfounded the claim made by the Serbian authorities of the FRY that some of the co-accused of Mr Slobodan Milosevic, in particular the former foreign minister of the FRY and incumbent president of Serbia, Mr M. Milutinovic, could not be arrested and handed over to the ICTY because they enjoyed immunities under the national or federal Constitution. Assuming this were correct under national law, the rules of the ICTY Statute would prevail, because those rules were enacted by the Security Council under Chapter VII of the UN Charter, and therefore override contrary treaties, customary rules, and also national legislation pursuant to Article 103 of the UN Charter.

²⁰⁶ In the above example, Major Tomas Ricardo Anderson Kohatsu, a retired official of Peru's notorious Army Intelligence Service, was alleged by the US State Department to have perpetrated 'horrendous crimes' in 1997. In early March 2000 the Peruvian authorities sent him to the US to appear before a hearing of the Inter-American Commission on Human Rights in Washington. When he was about to leave the US to return to Peru, FBI agents detained him, pursuant to the 1984 UN Convention against Torture, duly ratified by the US. However, a few hours later he was released following a decision by the Under-Secretary of State, Thomas Pickering. According to Pickering, Anderson was entitled to diplomatic immunity because he held a G-2 visa, granted to accredited members of the staff of the Peruvian Mission to the Organization of American States. Consequently, he could not be arrested or prosecuted (on-line: at www.windos/temp/center for constitutional rights.htm). It was pointed out by M. Ratner, (US Center for Constitutional Rights), that Anderson had not in fact been accredited to the Peruvian Mission. More importantly, the 1984 Convention on Torture does not permit exemption for diplomatic immunity. In any case, it was for the US courts to determine the matter. As Ratner pointed out, unlike Pinochet, 'despite serious doubts as to Anderson's claimed immunity, the decision to allow him to return to Peru was made by the State Department and not the courts' (see *ibid.*, at 2, §3).

the view that the Tribunal is not barred from prosecuting and trying state officials enjoying personal immunities (including inviolability and immunity from foreign criminal jurisdiction)? In other words, is a Head of State, a prime minister, a foreign minister or a diplomat, charged by the Tribunal's Prosecutor with the crime of terrorism, precluded from claiming personal immunity?

It is submitted that the above question must be answered in the affirmative, on three grounds. First, the judgment of the ICJ on Arrest warrant does not exclude either explicitly or implicitly that a customary rule on the matter has evolved with regard to international criminal courts and tribunals. It held that 'the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances' (§61). It then enumerated among such instances the case where 'an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction (*ibid.*, emphasis added). The Court then mentioned the ICTY, the ICTR, and the ICC, noting that the ICC Statute expressly provides, in Article 27(2), that [i] immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person" ' (*ibid.*). It is thus clear that the ICJ did not make the lifting of personal immunities before international criminal courts contingent upon the express or implicit contemplation of such lifting in the relevant courts statute. It instead held that the non-invocability of personal immunity before international courts was admissible to the extent that the relevant court or tribunal had jurisdiction over the international crime with which the state official at stake was charged.

Secondly, the rationale for foreign state officials being entitled to urge personal immunities before national courts does not apply to international courts and tribunals. That rationale resides in the need for foreign state officials not to be exposed to the prosecution by national authorities that might use this means as a way to interfering with the foreign state officials' activity, thereby unduly impeding or limiting their international action. In many states judicial authorities are not

independent of the political power; they could therefore decide to prosecute foreign state officials on grounds that have little to do with their legal or illegal conduct and indeed amount to a way of unduly interfering with the action of those state officials. This danger of abuse does not arise instead with regard to international criminal courts and tribunals, which are totally independent of states and subject to strict rules of impartiality. In addition, these courts and tribunals are much better equipped than national courts to deal with international crimes, because they are 'specialized' in this area and their judges are selected on account of their particular competence or experience in the matter.

Thirdly, the current thrust of international law is to broaden as much as possible the protection of human rights and, by the same token, to make those who engage in heinous breaches of such rights criminally accountable. The very logic of the present trends of international law therefore fully warrants the subjection of state officials to the judicial scrutiny of international independent bodies, whenever such officials (i) are accused of serious criminal offences against basic values of the world community; and (ii) there is no risk that such judicial scrutiny be surreptitiously used as a means of unduly restraining the official activity of the state agent concerned.

In summary, it seems justified to hold that under customary international law personal immunities of state officials may not bar international criminal courts and tribunals from prosecuting and trying persons suspected or accused of having committed international crimes, or at any rate the criminal offences over which the relevant international court or tribunal has jurisdiction.

All this applies to incumbent senior state officials. As soon as the state agent leaves office, he may no longer enjoy personal immunities and, in addition, becomes liable to prosecution for any international crime he may have perpetrated while in office (or before taking office), pursuant to the aforementioned customary rule lifting functional immunities in the case of international crimes.

(B) DO THEY EXEMPT SENIOR STATE OFFICIALS FROM THE DUTY TO TESTIFY OR HAND OVER EVIDENCE?

We must now briefly discuss the question of whether an incumbent senior state official belonging to one of the four abovementioned categories is entitled to invoke personal immunity in order to refuse either to testify before an international court or tribunal dealing with international crimes, or to hand over documents needed, by the court or tribunal.

Plausibly, a Head of State may not be compelled to testify before a. foreign court, not even with regard to an international crime: an order to testify issued by a national court to a foreign Head of State (or prime minister or foreign minister or diplomat) would run counter to international rules protecting personal immunities (as for the rationale behind this legal regulation, see above). Arguably here traditional notions relating to state sovereignty still apply and have not yet been set aside by the demands of international justice.

Does the same hold true for orders issued by international courts exercising jurisdiction over international crimes? It would seem that the rationale applying to the lifting of personal immunity from prosecution for those crimes, mentioned above, should also apply to the right of one of those senior officials to refrain from testifying; it follows that such right may not be invoked. Here the paramount demands of international justice, together with the absence of any possible risk that the international court may interfere with the state agent activity or abuse its powers, override the rights of senior state officials deriving from traditional notions of respect (by other states or state organs) for their sovereign prerogatives. It follows that an international criminal tribunal is empowered to compel a senior state official (belonging to one of the four categories) to testify (*subpoena ad testificandum*) or to hand over important documents (*subpoena duce tecum*).

Interestingly, the ICTY AC in *Krstic* (Decision on application for subpoenas decision) (§27) and an ICTRTC in *Bagosora* (Decision on request for a subpoena

for Major f.Biot, at §4) affirmed this authority of international criminal courts, stating that they may compel senior state agents to testify, whether or not such agents witnessed the relevant facts in their official capacity. Other courts have in fact eschewed pronouncing on the merits of this matter. In Fofana and others, in 2006 a SCSL TC did not grant a request to issue a subpoena ad testificandum against the incumbent President of Sierra Leone, for it found that the requirements set out in Rule 54 (on the power to issue such orders 'as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial') were not met in the case at issue. The AC upheld the decision (§§8-39). However, a member of the TC, Judge T, Thompson, issued a forceful opinion clearly showing that the law allowed the issuance of the order (Dissenting Opinion, §§14-30); similarly, in the AC Judge Robertson appended an opinion along the same lines, providing reference to previous case law (Dissenting Opinion, §§10-50). In Milosevic Slobodan (Decision of 9 December 2005) the AC declined to call to testify the incumbent British prime minister.

3.9 NATIONAL PERSONAL IMMUNITIES

The question of whether a national court is authorized to start proceedings against a national accused of international crimes, who happens to be a senior state official enjoying immunities under national law (for instance, the Head of State, a member of cabinet, a member of parliament) must be looked at from the viewpoint of international and national law.

Customary international law, it would seem, does not contain any rule imposing upon a state the obligation to disregard national legislation on immunities. However, treaty rules may impose the obligation to punish the authors of international crimes. If this is the case, any national legislation granting immunity would be in conflict with the treaty obligation.

National law may contain general rules granting immunity from prosecution for any crime, including international crimes. It very much depends on each particular national system. However, after the entry into force of the ICC Statute,

those states that are gradually ratifying such Statute are no longer allowed to rely upon any possible national legislation on immunities. The national implementation of the ICC Statute requires that states change their legislation (including their constitutional provisions, if any) on immunities, removing any such immunities for the international crimes that fall under the jurisdiction of the Court.

3.10 The general principles of criminal responsibility under International Criminal Law

3.11 GENERAL

As in any national legal system, also in ICL responsibility arises not only when a person materially commits a crime but also when he or she engages in other forms or modalities of criminal conduct. In the following paragraphs I shall set out these different modalities of participation.

Before I do so, it may however prove fitting to discuss briefly the position in national legal systems. They converge in holding that, where a crime involves more than one person, all performing the same act, all are equally liable as co-perpetrators, or principals. In contrast, national legal orders differ when it comes to the punishment of two or more persons participating in a crime, where these persons do not perform the same act but in one way or another contribute to the realization of a criminal design.

For instance, A draws up plans for a bank robbery, B provides the weapons, C performs the actual robbery, D acts as a lookout, E drives the getaway car, and F hides the loot and in addition gives shelter to the robbers. Many systems (for instance those of the US, France, Austria, Uruguay, and Australia) do not make any legal distinction between the different categories of participant and mete out the same penalty to each participant, whatever his role in the commission of the crime. As the California Penal Code provides at §31, all those 'concerned in the commission of a crime' including those who aid and abet the crime, are to be held liable as principals.

In spite of this legal regulation, for classificatory purposes and to aid analysis, legal commentators and courts use descriptive terms to distinguish between the various categories of participant: in the example given above, A is an 'accessory before the fact' (he is not a 'principal' for he was not present when the robbery was perpetrated), B is an aider and abettor (or an 'accessory before the fact'), C is a 'first degree principal', D and E are 'second degree principals', and F is an 'accessory after the fact'. However, as noted above, under the general sentencing tariff no distinction is made between these different categories of person. It is only provided that for accomplices or accessories extenuating circumstances may be taken into account if their participation in the offence is less serious than that of the principal or principals. In fact, for the purposes of sentencing, judges often draw a distinction between principals, instigators, and aiders and abettors.

In other national legal systems (for instance, Germany, Spain, and Russia) the law draws instead a normative distinction between two categories—principals, and accomplices or accessories—and provides in terms that the persons falling under the latter category must be punished less severely. Thus, for instance, in German law, the scale of penalties for accomplices (at least in the case of aiders and abettors, *Gehilfe*) is less harsh than for the perpetrator (*Tater*).²⁰⁷

We will see that in international law neither treaties nor case law (as indicative of customary rules) make any legal distinction between the various categories, at least as far as the consequent penalties are concerned. This lack of distinction follows both from: (i) the absence of any agreed scale of penalties in ICL; and from (ii) the general character of this body of law; that is, its still rudimentary nature and the ensuing lack of formalism (see *supra*, 1.2).

²⁰⁷ In two cases, the Extraordinary Courts Martial established in the Ottoman Empire to try persons accused of participating in massacring Armenians in 1915 and plundering their possessions, applied the Imperial Military Penal Code', which drew a normative distinction between principals and accessories. The Court therefore made a point of distinguishing between the 'principal perpetrators' and the 'accessories', and assigning a different sentence to each category of defendant. In *Kemal and Tevfik* the principal perpetrator was sentenced to death and the accessory to 15 years of hard labour (at 5-6, or 157-8); in *Bahaeddin Sdkir* and others the majority of judges held that two defendants were accessories, while three dissenting judges held that they 'were equally guilty of having been principal co-perpetrators' (at 4 and 8 or 171 and 173).

Consequently, the differentiation between the various classes of participation in crimes, which I shall set out below, is merely based on the intrinsic features of each modality of participation. It serves a descriptive and classificatory purpose only. It is devoid of any relevance as far as sentencing is concerned. It is for judges to decide in each case on the degree of culpability of a participant in an international crime and assign the penalty accordingly, whatever the modality of participation of the offender in the crime.

3.12 PERPETRATION

Whoever physically commits a crime, either alone or jointly with other persons, is criminally liable. For instance, the soldier who kills a war prisoner or an innocent civilian is liable to punishment for a war crime. Similarly, the serviceman who rapes an enemy civilian as part of a widespread or systematic attack on civilians is accountable for a crime against humanity,

Perpetration is thus the physical carrying out of the prohibited conduct, accompanied by the requisite psychological element.²⁰⁸

3.13 CO-PERPETRATION

²⁰⁸ In some cases courts have minimized the role of perpetrators executing illegal orders. This for instance holds true for Alfons Gotzfrid, which concerns mistreatment at the Majdanek camp. The Stuttgart Court (Landgericht) held that 'According to established case-law [...], the offender or accomplice is defined as one whose thoughts and actions coincide with those of the author of the crime, who willingly gives in to incitement to political murder, silences his conscience and makes another person's criminal aims the basis of his own conviction and his own action or who sees to it that orders of that kind are ruthlessly carried out or who in so doing otherwise displays consenting enthusiasm or who exploits State terror for his own purposes. Accordingly, the accused could only be shown to have an attitude denoting guilt if, over and above the activity he was instructed to carry out, he had performed some contributory act on his own initiative beyond the call of duty, shown particular enthusiasm, had acted with particular ruthlessness in the extermination operation or had shown a personal interest in the killings. These conditions cannot be shown to exist in the case of the accused. He was at the end of the chain of command, had no power to decide himself and no authority to act [...] Similarly, there is no evidence that the accused had any personal interest in the killing. He merely wanted to carry out the order which had been issued to him' (67, b).

Crimes are often committed by a plurality of persons. If all of them materially take part in the actual perpetration of the same crime and perform the same act (for instance, they are all members of an execution squad shooting innocent civilians), we can speak of co-perpetration. All participants in the crime partake of the same criminal conduct and the attendant mens rea.

3.14 PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE TO COMMIT INTERNATIONAL CRIMES

3.14.1 INTRODUCTION

International crimes such as war crimes, crimes against humanity, genocide, torture, and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by a multitude of persons: military details, paramilitary units or government officials acting in unison or, in most cases, in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the criminal enterprise or collective crime, on two grounds.

First, not all participants may have acted in the same manner, but rather each of them may have played a different role in planning, organizing, instigating, coordinating, executing or otherwise contributing to the criminal conduct. For instance, in the case of torture one person may order the crime, another may physically execute it, yet another may watch to check whether the victim discloses any significant information, a medical doctor may be in attendance to verify whether the measures for inflicting pain or suffering are likely to cause death, so as to stop the torture just before the measures become lethal, another person may carry food for the executioners, and so on. The question arises as to whether all these participants are equally responsible for the same crime, torture. Similarly, in the case of deportation of civilians or prisoners of war to an extermination camp, a commander may issue the order, several officers may organize the transport, others may take care of food and drinking water, others may carry out surveillance over the inmates so as to prevent their escape, others

may search the detainees for valuables or other things before deportation, and so on. Secondly, the evidence relating to each individual's conduct may prove difficult, if not impossible, to find. It would, however, be not only immoral, but also contrary to the general purpose of criminal law (to protect the community from the deviant behaviour of its members that causes serious damage to the general interests) to let those actions go unpunished. These considerations a fortiori apply to crimes such as murder or aggravated assault committed by a whole crowd; in such cases, it may prove even more difficult to collect evidence about the exact participation of members of the crowd in the crimes. The same considerations also hold true for cases where crimes are institutionally committed within organized and hierarchical units such as internment, detention, or concentration camps, where it is difficult to pinpoint the gradations of culpability of the various persons working within and for the organization.

As in most national legal systems, also in ICL all participants in a common criminal action are equally responsible if they (i) participate in the action, whatever their position and the extent of their contribution, and in addition (ii) intend to engage in the common criminal action. Therefore they are all to be treated as principals²⁰⁹ although of course the varying degree of culpability may be taken into account at the sentencing stage.²¹⁰

²⁰⁹ However, some courts of common law countries have taken the view that participants in a common criminal design may play the role of, and be regarded as, accessories. Thus, for instance, in *Einsatzgruppen*, with regard to common design, the Prosecutor T. Taylor, in his closing statement noted that 'the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, §2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility' (372).

²¹⁰ In this connection one may mention, by way of example, a decision of the Supreme Court of Bosnia and Herzegovina in *Tepez*, delivered on 1 October 1999: 'The appeal by the defence counsel argues that the contested judgment has not individualised the criminal responsibility of the accused and his personal involvement in actions characteristic of a war crime against the civilian population. For this crime to exist it is necessary to "commit murder, torture, inhumane acts, inflict severe suffering, physical and mental injuries on civilians, destroying their health and physical integrity". The disposition does not include these essential elements of this criminal act and therefore represents a major violation of the provisions of criminal procedure. This Court finds these allegations groundless. The appeal fails to note that the contested judgment states that the accused carried out these actions with three other named individuals (as

The notion of joint criminal enterprise (JCE) denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan. At the same time, this notion does not run contrary to the general principles of criminal law. As in national legal systems, the rationale behind this legal regulation is clear: if all those who take part in a common criminal action are aware of the purpose and character of the criminal action and share the requisite criminal intent, they must perforce share criminal liability, whatever the role and position they may have played in the commission of the crime. This is the case because: (i) each of them is indispensable for the achievement of the final result; and on the other hand (ii) it would be difficult to distinguish between the degree of criminal liability, except for sentencing purposes.

Thus, it is by now widely accepted by international criminal courts that in the case of collective' criminality where several persons engage in the pursuit of a common criminal plan or design, all participants in this common plan or design may be held criminally liable for the perpetration of the criminal act, even if they have not materially participated in the commission of said act; in addition, they may also be held responsible, under a number of well-defined conditions, for criminal conduct that, although not originally envisaged in the common criminal design, has been undertaken by one of the participants and may to some extent be regarded as a natural and foreseeable consequence of such a common plan.

well as others), which means that he perpetrated the crime for which he has been pronounced guilty in complicity with others. It further means that in cases of this kind where it is not possible to isolate individual actions and their consequences or to distinguish the degree to which each person was involved in their execution, it suffices that these actions complement each other and together form a single entity, which the accused [Tepe] wishes to achieve by being involved. Therefore it was neither possible nor necessary for the court of first instance to separate only the actions of the accused. It suffices that the accused participated in executing these actions, even if it had only been one or two actions of personal involvement in the beating of civilians. However, the court of first instance has established that the accused personally beat up many individuals on many occasions' (2).

Also the decision of a Canadian court in Moreno deserves mentioning: In reaching this conclusion, I am influenced by one commentator's view that the closer a person is involved in the decision-making process and the less he or she does to thwart the commission of inhumane acts, the more likely criminal responsibility will attach (...) of course, the further one is distanced from the decision makers, assuming that one is not a "principal", then it is less likely that the required degree of complicity necessary to attract criminal sanctions, or the application of the exclusion clause, will be met' (18). See also Ramirez (6-9)

It is also widely accepted that at the international level this mode of criminal liability can take three different forms. It was the ICTY AC that first articulated in Tadic (A) 1999) the doctrine of ICE as a fully fledged legal construct of modes of criminal liability. However, the doctrine had already been upheld at the national or international level by various courts, if only in passing. In Tadic (A) 1999) the ICTY AC spelled out the three categories I will refer to below.

3.14.2 LIABILITY FOR A COMMON INTENTIONAL PURPOSE

(A) The notion

The first and more widespread category of liability is responsibility for acts agreed upon when making the common plan or design. Here all the participants share the same intent to commit a crime, and all are responsible, whatever their role and position in carrying out the common criminal plan (even if they simply vote, in an assembly or in a group, in favour of implementing such a plan). In addition to shared intent, *dolus eventualis* (i.e. recklessness or advertent recklessness) (see *supra*, 3.7) may also suffice to hold all participants in the common plan criminally liable. For instance, if a group of servicemen decides to deprive civilians of food and water in order to compel them to build a bridge necessary for military operations or to disclose the names of other civilians who have engaged in unlawful attacks on the military, and then some civilians die, the servicemen should all be accountable not only for a ICE to commit the war crimes of intentionally starving civilians and 'compelling the nationals of the hostile party to take part in operations of war directed against their own country; they should also be held guilty of murder. Indeed, even if the servicemen did not intend to bring about the death of the civilians, the death was the natural and foreseeable consequence of their common criminal plan and the follow-up action.

Society—in our case the world community—must defend itself from this collective criminality by reacting in a repressive manner against all those who, in some form, took part in the criminal enterprise. Society may not indulge in distinctions between the different roles played by each of the participants when trying to

uproot or, better, punish this form of collective criminality. All actors are guilty, even though in some instances the mens rea (for example, intent to murder) is not attended by the corresponding conduct (for example, stabbing or firing a gun); this applies to all those who, while sharing the criminal intent, do not carry out the primary crime (for example, the driver or the look-out in an armed robbery involving murder). However, the differing degrees of culpability can be taken into account at the stage of sentencing.

(B) Case law

In Ponzano, a case concerning the unlawful killing of four British prisoners of war by German troops, the Judge Advocate adopted the approach suggested by the Prosecutor, and stressed the requirement that an accused, before he can be found guilty, must have been concerned in the offence (...T]o be concerned in the commission of a criminal offence [...] does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation [...l]n other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means (at 7). The Judge Advocate also underlined that the accused should have knowledge of the intended purpose of the criminal enterpriser.²¹¹

²¹¹ Georg Otto Sandrock et al. (also known as the Almelo Trial) can also be cited. Three Germans had killed a British prisoner of war; it was clear that they had all had the intention of killing the British soldier, although each of them played a different role. The British Court found all of them guilty of murder under the doctrine of common enterprise' (at 35,40-1). In Holzer and others, brought before a Canadian military court, in his summing up the Judge Advocate emphasized that the three accused (Germans who had killed a Canadian prisoner of war) knew that the purpose of taking the Canadian to a particular area was to kill him. The Judge Advocate spoke of a 'common enterprise' with regard to that murder (at 341, 347, 349). In Jepsen and others a British court had to pronounce upon the responsibility of Jepsen and others for the death of inmates of a concentration camp in transit to another concentration camp. The Prosecutor argued that '[I]f Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act'. The Judge Advocate did not rebut the argument (at 241). In Schonfeld the Judge Advocate stated that: 'if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present f...] provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly' (68).

In 2001, in *Krstic*, an ICTY TC held that the defendant had participated in a ICE to commit genocide. The Court explained at length that initially Krstic had only taken part in a common plan to forcibly expel Muslims from the area of Srebrenica; however, later on, when it became apparent that the various military leaders in fact were planning the killing of thousands of military-aged men, the defendant showed, through his various acts and behaviour, that he shared the 'genocidal intent to kill the men' (§§621-45). The Chamber therefore found Krstic guilty of genocide and sentenced him to 46 years in prison. The AC held instead that Krstic was only guilty of complicity in genocide, for he had not shared the genocidal intent but simply aided and abetted genocide. It reduced his sentence to 35 years' imprisonment.

In 2003, in *Blagojevic, Simic and others* an ICTY TC held that the three accused, Bosnian Serbs operating in the municipalities of Bosanski Sarna'; and Odzak in Bosnia Herzegovina, committed various crimes there. The main defendant, Simic (who, at the time of the conflict, was the President of the Municipal Assembly and of the Crisis Staff, later renamed 'the War Presidency'), participated in a basic form of JCE. He shared with others the intent to execute a common plan of persecution to non-Serb civilians in the Bosanski Samac municipality. According to the TC, Simic, as the highest-ranking civilian in the municipality, acted in unison with others to execute a plan that included: the forcible takeover of the town of Bosanski Samac, and the persecutions of non-Serb civilians in the area, which took the form of unlawful arrests and detention, cruel and inhumane treatment including beatings, torture, forced labour assignments, and confinement under inhumane conditions, deportations and forcible transfers. The Chamber held that he was a participant in the JCE, while no evidence permitted the conclusion that the other two defendants were also participants (TC, 2003, §§144-60,983-1055).²¹²

²¹² It should be noted that the ICTR upheld the doctrine at issue as well. In *Rwamakuba* (Decision on Interlocutory appeal) the AC held that the Tribunal had jurisdiction to try the appellant on a charge of genocide through the mode of liability of ICE (§§9-39). In *Elizaphan Ntakirutimana and Gerard 'akirutimana* the AC relied upon the first category of JCE, but found that the TC had been correct in not applying the doctrine to the case at issue (§§462,466,468-84). In *Simba*, in 2005, an ICTR TC held [hat the accused was guilty of JCE to commit genocide and extermination (§§386-96, 411-19, 420-6). In another case where the Prosecution had similarly charged a person with JCE to commit genocide and extermination (*Mpambara*), an ICTR TC held instead that no proof beyond a reasonable doubt had been tendered that the

The ICTY took an important stand in *Brdanin* in 2004. In the indictment, the Prosecution had alternatively pleaded the defendants criminal responsibility pursuant to the first and third categories of JCE (on this third category see *infra*, 9.4.4). With respect to the first category, the Prosecution alleged in the various counts that '(the purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged'. The alternative pleading of the third category specified that '(the defendant) [was] individually responsible for the crimes enumerated in [various counts] on the basis that these crimes were natural and foreseeable consequences of the acts' of deportation and forcible transfer of civilians. The Chamber noted that for both categories of JCE to materialize, it was required to prove not only the existence of a common criminal plan, but also that the crimes had been perpetrated by one or more participants in such common plan. However, in the case at issue the crimes had been committed by members of the army, police, and para-military groups that had not participated in the criminal plan or enterprise (§345)²¹³ The Chamber therefore dismissed the applicability of the notion of JCE to those crimes (§§351 and 355). However, the AC reversed the TC decision on this issue, taking the contrary view. After reviewing post-Second World War case law it concluded that such case law recognizes the imposition of liability upon an accused for his participation in a common criminal purpose, where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose and that in addition it does not require proof that there was an understanding or agreement to commit that particular crime between the accused and the principal perpetrator of the crime. The AC thus held that [V]hat matters in a first category ICE is not whether the person who carried out the *actus reus* of a particular crime is a member of JCE, but whether the crime in question forms part of the common purpose, in cases where the principal perpetrator of a particular crime is not a member of the JCE, this

accused possessed the intent to be part of a JCE. It consequently acquitted him on all counts of the indictment (§§13-4,38-40, 76, 113,164).

²¹³ The TC had set out the same view in a previous decision in the same case (*Brdanin*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, §44).

essential requirement may be inferred from various circumstances, including the fact that the accused or any other member of the ICE closely cooperated with the principal perpetrator in order to further the common criminal purpose. In this respect, when a member of the JCE uses a person outside the JCE to carry out the actus reus of a crime, the fact that the person in question knows of the existence of the ICE—without it being established that he or she shares the mens rea necessary to become a member of the JCE—may be a factor to be taken into account when determining whether the crime forms part of the common criminal purpose. However, this is not a sine qua non for imputing liability for the crime to that member of the JCE (§410). (...) Considering the discussion of post-World War II cases and of the Tribunals jurisprudence above, the Appeals Chamber finds that, to hold a member of the JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member—when using a principal perpetrator—acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis (§413).

The AC clinched the point by adding, always in light of post-Second World War jurisprudence, that when the principal perpetrator is not part of the JCE, for the accused to be held liable for the crime perpetrated, an understanding or an agreement between the accused and the principal perpetrator of the crime is not necessary. It may suffice that the crime at issue be part of the common criminal purpose (§§415-19) and the accused 'uses' the principal perpetrator to further that purpose (§§430-1).

For the reasons set out below (§§9.4.5), it is respectfully submitted that this broadening of the notion under discussion is excessive and raises doubts about its consistency with the nullum crimen principle and the principle of personal responsibility. The AC'S ruling in Brctdililn seems all the more objectionable because in the same case the Chamber also held that the doctrine of the JCE extends to large-scale cases' or in other words covers instances where crimes

are perpetrated on a large scale by individuals who are remote from the accused (§§420-5).

3.14.3 LIABILITY FOR PARTICIPATION IN A COMMON CRIMINAL PLAN WITHIN AN INSTITUTIONAL FRAMEWORK

(A) The notion

The second modality of liability is that of responsibility for carrying out a task within a criminal design that is implemented in an institution such as an internment, detention, or concentration camp. In one such camp where inmates are severely ill-treated and even tortured, not only the head of the camp, but also his senior aids and those who physically inflict torture and other inhuman treatment bear responsibility for those acts. In addition to those who physically carry out the misdeeds, also those who discharge administrative duties indispensable for the achievement of the camp's main goals (for example, to register the incoming inmates, record their death, give them medical treatment, or provide them with food) may incur criminal liability.

They bear this responsibility so long as they (i) are aware of the serious abuses being perpetrated (knowledge); (ii) willingly take part in the functioning of the institution (intent); and (iii) make an important contribution to the pursuit of the institution's goals. That they should be held responsible is only logical and natural: by fulfilling their administrative or other operational tasks, they contribute to the commission of crimes. Without their willing support, crimes could not be perpetrated. Thus, however peripheral their role, they may constitute an indispensable cog in the murdering machinery. The man who, upon arrival of new trains at Auschwitz, separated the men and the women from the children and the elderly, knowing that this served to establish who should be a forced labourer and who should instead be sent immediately to gas chambers, was instrumental in the perpetration of extermination. Had he intended to shirk criminal responsibility, he should have asked to be relieved of his duties and to discharge other duties elsewhere. This decision was possible and was

sometimes made (although it often involved being sent to combat zones on the Eastern Front). Similarly, the locomotive driver of a train that carried hundreds of detainees to Auschwitz could have been held criminally liable for his participation in extermination, so long as he knew what would happen to the persons he was transporting and showed to share the intent to exterminate those persons by willingly continuing to fulfill his role (instead of asking to be exempted from this horrible task).

It can thus be noted that for this mode of liability no previous plan or agreement is required. Nevertheless, one can legitimately hold that each participant in the criminal institutional framework not only is cognizant of the crimes in which the institution or its members engage, but also implicitly or expressly shares the criminal intent to commit such crimes. It cannot be otherwise, because any person discharging a task of some consequence in the institution could refrain from participating in its criminal activity by leaving it. As pointed out above, for criminal liability to arise it is also necessary that the person at issue make a substantial contribution to the joint criminal enterprise. It follows that those who, for example, merely sweep the streets or clean the laundry should not incur criminal liability for their action, although they may both be aware of the criminal purpose pursued by the whole institution and share it.

Clearly, this mode of responsibility is very close to that of criminal organizations laid down in the IMT Charter annexed to the London Agreement of 8 August 1945 (Articles 9-11), and upheld in some respects by the IMT at Nuremberg (see *infra*, 2.2). Indeed, in both cases belonging to and operating for an organization (or an institutional framework) that primarily or at least in part pursues criminal purposes involves, subject to certain conditions, the personal guilt of a member. However, the conditions for personal liability of a member to arise are only partially similar. True in both cases membership as such is not punishable. In both cases it is necessary for the member to have knowledge of the criminal acts being committed or be personally implicated in the commission of such acts.²¹⁴

²¹⁴ In *Goring and others* the IMT held that the definition of criminal organization 'should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by

However, in the case of criminal organization this would be sufficient, for the assumption is that the organization as such institutionally pursues a criminal purpose (e.g. extermination of a racial or religious group). Instead, in the JCE under consideration, since the institutional aims are not per se criminal (the camp has been established to detain prisoners of war, or intern enemy civilians, etc.), but the institution is incidentally used for criminal purposes (torture, murder, extermination, rape, etc.), it is also necessary for a member to make a substantial contribution to the furtherance of criminal purposes, for his liability to arise.

(B) Case law

One can find a particularly clear and significant illustration of this category of criminality in Alfons Klein and others (the Hadamar trial), heard by a US Military Commission sitting at Wiesbaden. It is fitting to dwell on this case at some length, because it best shows how the category of criminality at hand works.

The accused were seven Germans. Between July 1944 and April 1945, they killed over 400 Polish and Russian nationals, who had been obliged to work in Germany for the German war effort and were suffering from tuberculosis or pneumonia. Brought to Hadamar, in Germany, where there was a hospital or institution originally designed to care for the mentally unsound, but with no medical facilities to treat persons ill with tuberculosis or pneumonia, they were told that they would be given medication. In fact they were killed by injections of poisonous drugs; afterwards the relevant medical records and death certificates were falsified. It would seem that the primary purpose of these killings was to make space in hospitals for German war victims. The accused comprised Klen, the administrative head of the hospital, a local Nazi Party leader who made all the arrangements leading to the perpetration of the atrocities; Wahlmann, a physician specializing in mental diseases, the Institution's only doctor (he participated in the conferences designed to plan the murders, knew what was

the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 or the Charter as members of the organization' (at 256).

going on at the hospital, and acquiesced in it); three nurses, Ruoff, Willig, and Huber, who administered the poisonous drugs; Merkle, the institution's book-keeper (who registered incoming patients for the purpose of recording dates and causes of death, actually falsifying these documents); and Blum, a doorman and telephone switchboard operator, who also served as caretaker of the cemetery, charged with burying the victims in mass graves (but he sometimes walked through the wards to inspect the victims before they were taken, dead, to his cellars a few hours later).

The charge for all of them was 'violation of international law', namely, as the Prosecutor specified in his opening argument, breach of the laws of warfare (at 202). The specification stated that the seven accused 'acting jointly and in pursuance of a common intent' did [...] willfully, deliberately and wrongfully aid, abet and participate in the killing of human beings of Polish and Russian nationality'. Thus, in addition to the notion of 'participation in killing based on common intent' also the notion of 'aiding and abetting' was used. However, in his Opening Argument the Prosecutor, when setting out the applicable law (there was no Judge Advocate), emphasized that all those who participate in a common criminal enterprise are equally guilty as 'co-principals whatever the role played by each single participant. Referring to the case of murder committed by several persons, he pointed out that

Every single one of those who participated in any degree towards the accomplishment of that result [murder] is as much guilty of murder as the man who actually pulled the trigger [...] That is why under our (that is US) Federal Law all distinctions between accomplices, between accessories before the fact and accessories after the fact, have been completely eliminated. Anyone who participates in the commission of any crime, whether formerly called as an accessory or no, are now co-principals and have been so for several years (203).

Moving then to the case at bar, the Prosecutor in fact offered an eloquent illustration of the rationale behind the legal notion he was invoking :

At this Hadamar mill there was operated production line of death. Not a single one of these accused could do all the things that were necessary in order to have the entire scheme of things in operation. For instance, the accused Klein, the administrative head, make arrangements for their death chamber, and at the same time go up these and use the needle that did the dirty work, and then also turn around and haul the bodies out and bury them, and falsify the records and the death certificates. No, when you do business on a wholesale production basis as they did at the Hadamar Institution, that murder factory, it means that you have to have several people doing different things of that illegal operation in order to produce the results, and you cannot draw a distinction between the man who may have initially conceived the idea of killing them and those who participated in the commission of those offences. Now, there is no question but that any person, who participated in that matter, no matter to what extent, technically is guilty of the charge that has been brought [...] every single one of the accused has overtly and affirmatively participated in this entire network that brought about the illegal result (205-7).

The defence counsel did not dispute these concepts, but in their arguments preferred to rely upon the notions of necessity and superior orders, or argued that German law rather than US or international law should apply. The Court upheld the charge. The administrative head of the hospital and two nurses were sentenced to death; the physician (a 70-year-old man) to life imprisonment and hard labour; the book-keeper to 35 years and hard labour; the third nurse to 25 years and hard labour; the doorman and caretaker to 30 years and hard labour (at 247).

Courts also applied this notion of JCE in cases where the crimes had allegedly been committed by members of military or administrative units running concentration camps; that is, by groups of persons acting pursuant to a concerted plan.²¹⁵ In such cases the accused held some position of authority

²¹⁵ See, for instance, such cases as Dachau Concentration Camp, brought before a US Tribunal under Control Council Law no. 10 (at 5. 14), Nadlerand others, decided by a British Court of Appeal under Control Council Law no. 10 (at 132-4), Auschwitz Concentration Camp, decided by a German Court (at 882), as well as Belsen, decided by a British military court sitting in Germany (121).

within the hierarchy of the concentration camps. Normally, the defendants were charged with having acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.²¹⁶ When found guilty, they were regarded as co-principals in the various crimes of ill-treatment, because of their objective 'position of authority' within the concentration camp system and because they had 'the power to look after the inmates and make their life satisfactory' but failed to do so. In these cases, as the ICTY AC pointed out in *Tadic* (AJ, 1999) the required actus reus was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The mens rea element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime (§203).

Later on an ICTY TC invoked this mode of responsibility in 2001 in *Kvocka and others*. The Chamber found that the five defendants had occupied positions or roles in the operation of a detention camp at Omarska, where various crimes were committed (persecution, murder, and torture). *Kvocka* had been the camp commander's right hand; *Kos* was a guard shift commander; *Radic* was a shift commander. *Zigic*, who was a taxi driver in the *Prijedor* area during the period of 26 May to 30 August 1992, used to enter Omarska as well as other two camps for the purpose of abusing, beating, torturing, and killing prisoners. Finally, *Prcac*

²¹⁶ In his summing up in the *Betsen* case, the Judge Advocate took up the three requirements set out by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organized system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e. encouraged, aided, and abetted or in any case participated in the realization of the common criminal design (637-41).

was de facto a deputy camp commander. According to the Chamber, the Omarska camp 'was a JCE, a facility used to interrogate, discriminate against, and otherwise abuse non-Serbs from Prijedor and which functioned as a means to rid the territory of or subjugate non-Serbs' (§323). The Chamber held that the continuous perpetration of crimes in the camp was common knowledge to anybody living there (§324). It held that all the accused formed part of a JCE to commit the crimes ascribed to them, and sentenced all of them to varying sentences. The AC confirmed the convictions and sentences.

It is worth stressing that the TC rightly emphasized the need for the participation of a person in an institutionalized JCE to be 'significant'; that is, through 'an act or omission that makes an enterprise efficient or effective; e.g. a participation that enables the system to run more smoothly or without disruption' (§309). It then wisely went on to note that the significance of the contribution is to be determined on a case-by-case basis, taking into account a variety of factors (§311). On this point the AC took a slightly different stand.²¹⁷

In other cases the Chamber has stressed the need for the contribution of each participant in a JCE to be 'substantial'.²¹⁸ For instance, in *Lima* and others an ICTYTC found that the Prosecution had not proved that the three accused persons (members of the Kosovo Liberation Army) were liable for a joint criminal enterprise to commit in 1998 such crimes as torture, ill-treatment, and murder in a prison camp in Kosovo (§§665-70).

It bears noting that the requirement that the contribution of a participant in a JCE should be 'substantial' had not been envisaged by the ICTY AC in *Tadic* (A], 1999, §227). This requirement seems to the present writer to be indispensable.

²¹⁷ It held that 'in general, there is no specific legal requirement that the accused make a substantial contribution to the JCE. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the JCE. In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose (§97). However, the Chamber subsequently held that in some exceptional cases the 'substantial' character of a participants contribution is needed (§599).

²¹⁸ *Ibid.* §667

3.14.4 INCIDENTAL CRIMINAL LIABILITY BASED ON FORESIGHT AND VOLUNTARY ASSUMPTION OF RISK:

(A) The notion

The third mode of responsibility concerns those participants who agreed to the main goal of the common criminal design (for instance, the forcible expulsion of civilians from an occupied territory) but did not share the intent that one or more members of the group entertained to also commit other crimes incidental to the main concerted crime (for instance, killing or wounding some of the civilians in the process of their expulsion). This mode of liability only arises if the participant who did not have the intent to commit the 'incidental' offence, was nevertheless in a position to foresee its commission and willingly took the risk.

A clear example in domestic criminal law of this mode of liability is that of a gang of thugs who agree to rob a bank without killing anyone, and to this end agree to use fake weapons. In this group, however, one of the members secretly takes real weapons with him to the bank with the intent to kill, if need be. Suppose another participant in the common criminal plan sees this gang member stealthily carrying those weapons. If the armed man then kills a teller or bank officer during the robbery, the one who saw him take the real weapons may be held liable for robbery and murder, like the killer and unlike the other robbers, who will only be liable for armed robbery. Indeed, he was in a position to expect with reasonable certainty that the robber who was armed with real weapons would use them to kill, if something went wrong during the robbery. Although he did not share the mens rea of the murderer, he foresaw the event and willingly took the risk that it might come about (plainly, he could have told the other robbers that there was a serious danger of a murder being committed; consequently, he could either have taken the weapons away from the armed robber or withdrawn from the specific robbing expedition or even dropped out of the gang).

To clarify the matter, one should perhaps distinguish between an abstract and a concrete foreseeability of the unconcerted crime. Arguably, for criminal liability

under the third category of ICE to arise it is necessary for the unconcerted crime to be abstractly in line with the agreed-upon criminal offence; in addition, it is also essential that the 'secondary offender' had a chance of predicting the commission of the unconcerted crime by the 'primary offender'. For instance, if a paramilitary unit occupies a village with the purpose of detaining all the women and enslaving them, a rape perpetrated by one of them would be in line with enslavement, since treating other human beings as objects may easily lead to raping them. It would, however, also be necessary for the 'secondary offender' to have specifically envisaged the possibility of rape (a circumstance that should be proved or at least inferred from the facts of the case), or at least to have been in a position to predict the rape.

Furthermore, we should ask ourselves whether the mens rea requirement for this JCE is the 'secondary offenders' subjective foresight of the likelihood of the crime being committed by the 'primary offender' (i.e. the 'secondary offender' actually foresaw that the offence would be committed), or instead objective foreseeability of that likelihood (i.e. he ought to have foreseen that the crime was likely to be perpetrated). As the Supreme Court of Canada rightly pointed out in two celebrated decisions concerning constructive murder' (i.e. murder imputed to a person by law from his course of actions, though his deeds taken severally do not amount to voluntary murder), *R. v. Vaillancourt* (1987) and *R. v. Martineau* (1990), objective foreseeability constitutes a lower threshold.²¹⁹ This threshold the Court in *Vaillancourt* considered admissible in cases of 'constructive murder', whereas in *Martineau* the same Court held the subjective test to be more consonant with principles of fundamental justice. Probably the later ruling was

²¹⁹ See *R. v. Vaillancourt*, judgment of 3 December 1987, [1987] 2 S.C.R. 636 (online: www.scc.lexum.umontreal.ca/1987/1987rcs2-636, at 24-29) and *R. v. Martineau*, judgment of 13 September 1990, [1990] 2 S.C.R. 633 (online at: www.scc.lexiim.umontreal.ca/1990/199rcs2-633, at 16-20). The facts in *Vaillancourt* are interesting. During an armed robbery, appellants accomplice shot and killed a client. He then escaped but the appellant was arrested and convicted of second degree murder (i.e. unlawful taking of human life with malice but without deliberation or premeditation) as a party to the offence. However, the two had previously agreed to commit the robbery armed only with knives; when on the night of the robbery the accomplice arrived with a gun, the appellant insisted that it be unloaded; the accomplice removed three bullets from the gun and gave them to the appellant, whose glove containing the three bullets was later recovered by the police at the scene of the crime. The Court upheld the appeal against conviction and ordered a new trial. As Judge L'Heureux-Dube later noted in his dissenting opinion in *Martineau*, "The facts themselves in *Vaillancourt* negated mens rea [...] Given these facts, it seems unlikely that *Vaillancourt*, or any reasonable person in his position, had reason to foresee that anyone would be killed in the course of the robbery" (at 29).

also dictated by the fact that under Canadian legislation a finding of murder entails a mandatory sentence of life imprisonment; it was therefore felt necessary to raise the threshold of culpability for any such finding. Be that as it may, it would seem that at the international level the lower requirement of objective foreseeability is upheld by case law, as proved by the cases that I will consider below. In other words, at the international level what is required is not that the 'secondary offender' actually predicted that the 'primary offender' would engage in unconcerted criminal conduct; the test is rather whether a man of reasonable prudence would have forecast that conduct, under the circumstances prevailing at the time. Three reasons seem to warrant the acceptance of a lower threshold at the international level. First, the crimes at issue are massive and of extreme gravity; moreover, they are normally perpetrated under exceptional circumstances of armed violence. Under these circumstances one can legitimately expect that combatants and other persons participating in armed hostilities or involved in large-scale atrocities be particularly alert to the possible consequences of their actions. Secondly, the gravity of the crimes at issue makes it necessary for the world community to prevent and punish serious misconduct to the maximum extent allowed by the principle of legality. Thirdly, in ICL there is no fixed scale of penalties; courts are therefore free duly to appraise the level of culpability of the accused and impose a congruous sentence accordingly.

Some commentators have noted that the foreseeability standard on which this form of liability is based is unreliable, so much so that through such a standard—it has been claimed—the doctrine introduces a 'form of strict liability'. It has also been contended that this category of criminal enterprise disregards the necessity that a person be held guilty only if his culpability has been proven; or in other words, that the causal link between his conduct and mens rea on the one side, and the crime, on the other, be proved. Based on that doctrine, one would find a person guilty of, say, murder, even if that person lacked the requisite subjective element (intent or dolus) proper to the crime and only entertained a lesser form of mens rea (foreseeability plus willingly taking the risk that the crime be perpetrated; that is dolus eventualis). It would follow that the causal link between

mens rea and conduct on the one side and the event or crime, on the other, would be lacking. Thus—so the objection continues—under certain conditions, one would place on a par the person who deliberately brought about the death of the victim with an individual who instead did not intend to cause such effect.

This objection is indisputably important,²²⁰ and can be met by propounding three arguments.

First, the foundation of this mode of responsibility is to be found in considerations of public policy; that is the need to protect society against persons who (i) band together to take part in criminal enterprises; and (ii) while not sharing the criminal intent of those participants who intend to commit more serious crimes outside the common enterprise, nevertheless are aware that such crimes may be committed; and (iii) do not oppose or prevent them. These policy considerations were aptly spelled out by the House of Lords in 1997, in two cases decided jointly, *Regina v.*

²²⁰ For critical remarks about ICE, see in particular I. D. Ohiin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, 5/FC/(2007), 69-90, in particular 75-88 (this paper is, however, marred by the insistence on the concept of conspiracy and a misapprehension of the relevant international *c«se* law); E. van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', *ibid.*, 184-207, particularly 187-91; K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', *ibid.*, 159-83.

Less significant is the objection frequently heard whereby the category of ICE under discussion in fact amounts to, or is equally objectionable as, the common law concept of 'felony-murder'. Such concept, still widespread (albeit on the wane) in such countries as the UK, some states of the USA, New Zealand and certain Australian states, is substantially different from JCE. As first enunciated by Coke in 1797 (*E. Coke, The Third Part of the Institutes of the Laws of England*, London: Clarke and Sons, 181/, at 56), the concept entails that if an unlawful act involves the perpetration of murder, then the individual is guilty of murder (in the celebrated example by Coke, if a person (A), intending to steal a deer in the park of another person (B), throws an arrow at the deer but in so doing kills a boy hidden in a bush, he is guilty of murder 'for that act was unlawful, although A. had no intent to hurt the boy, nor knew not of him'). The concept has been widely criticized for it equates manslaughter (involuntary killing) to murder i.e. intentional killing of another person. In the case of the JCE we are discussing the secondary offender not only is involved in a common criminal plan or purpose to commit some crimes and has the intention to commit those crimes, but also actually foresees (or is in a position to foresee) the likely perpetration of a further crime by a member of the criminal group, and nevertheless deliberately accepts the risk of such likelihood. There is therefore here a mental element present with regard to the perpetration of the 'extra crime' (*dolus eventualis*) that is instead absent in the felony-murder or, if present, then only in the attenuated form of *culpa* (negligence). In the case of 'felony-murder' the agent does not figure out at all the possibility of killing a person as a result of his engaging in an unlawful action such as theft; instead in the category of ICE we are discussing the agent is aware (or at least is fully in a position to be aware) that a crime may be perpetrated by another person and deliberately omits to take action (i.e. to stop or prevent that person from perpetrating the crime, or to disassociate himself from that criminal conduct). In addition, the concept of JCE can only be relied upon on condition that the lesser culpability of the secondary offender shall be taken into account at the sentencing stage.

Powell and another and Regina v. English²²¹, although the cases concerned crimes committed at the domestic level. The speeches of Lords Steyn²²² and Sutton²²³ are enlightening. In their view by punishing the 'secondary-offender' the

²²¹ In the first case, P., D., and a third man went to the home of a dealer in cannabis. As soon as he opened the door, one member of the group shot him and he died shortly afterwards. The defendants were charged with murder on the basis of joint enterprise. At the trial P. gave evidence and claimed that he was present at the scene only to buy cannabis. D. did not give evidence, but it was submitted on his behalf that he was unaware of the presence of the gun until it was used and that P. was responsible for the shooting. Both defendants were convicted of murder. The Court of Appeal (Criminal Division) dismissed both defendants' appeals.

In the second case, the defendant, E., aged 15 at the time of the offence, and W. were convicted of the murder of a police sergeant on the basis of joint enterprise. Both the defendant and W. had attacked the deceased with wooden posts. At the trial it was the Crown's case that the defendant was present when W. produced the knife with which the fatal injuries were inflicted. It was maintained on the defendant's behalf that there was evidence that he had fled the scene before W. produced the knife. The Court of Appeal (Criminal Division) dismissed, however, E.'s appeal.

²²² 16 His Lordship stated the following: 'At first glance there is substance in the third argument (of counsel for the Appellants) that it is anomalous that a lesser form of culpability is required in the case of a secondary party, viz. foresight of the possible commission of the greater offence, whereas in the case of the primary offender the law insists on proof of the specific intention which is an ingredient of the offence. This general argument leads, in the present case, to the particular argument that it is anomalous that the secondary party can be guilty of murder if he foresees the possibility of such a crime being committed while the primary can only be guilty if he has an intent to kill or cause really serious injury. Recklessness may suffice in the case of the secondary party but it does not in the case of the primary offender. The answer to this supposed anomaly, and other similar cases across the spectrum of criminal law, is to be found in practical and policy considerations. If the law required proof of the specific intention on the part of a secondary party, the utility of the accessory principle would be gravely undermined. It is just that a secondary party who foresees that the primary offender might kill with the intent sufficient for murder, and assists and encourages the primary offender in the criminal enterprise on this basis, should be guilty of murder. He ought to be criminally liable for harm which he foresaw and which in fact resulted from the crime he assisted and encouraged. But it would in practice almost invariably be impossible for a jury to say that the secondary party wanted death to be caused or that he regarded it as virtually certain. In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases. Moreover, the proposed change in the law must be put in context. The criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed. For these reasons I would reject the arguments advanced in favour of the revision of the accessory principle' (8).

²²³ My Lords, I recognise that as a matter of logic there is force in the argument advanced on behalf of appellants, and that on one view it is anomalous that the foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder in the party who actually carries out the killing, it is sufficient to constitute mens rea in a secondary party. But the rules of the common law are not based solely on logic but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs. As Lord Salmon stated in *Reg. v. Majewski* (1977) A.C. 443, 482e, in rejecting criticism based on strict logic of a rule of the common law, "this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic". In my opinion there are practical considerations of weight: importance related to considerations of public policy which justify the principle stated in *Chan Wing-Siu* [The Queen v. Chan Wing-Siu] (1985) A.C. 168 and which prevail over considerations of strict logic' (15)

law intends to convey the message that he should have opposed or impeded the crime of the 'primary offender'.

The second argument is more germane to strictly legal considerations. Generally speaking, one should not neglect an important factor: incidental criminal liability based on foresight and risk is a mode of liability that is consequential on (and incidental to) a common criminal plan; that is, an agreement by a multitude of persons to engage in illegal conduct. The 'extra crime' we are discussing is the outgrowth of previously agreed or planned criminal conduct for which each participant in the common plan is already responsible. This 'extra crime' is rendered possible by the prior joint planning to commit the agreed crime(s) other than the one 'incidentally' or 'additionally' perpetrated. Thus, what is at stake here is not the responsibility arising when members of a group (for instance, a military unit) engage in lawful action for example, overpowering by military force an enemy fortification) and in the course of combat one of the combatants kills a civilian or rapes a woman—a crime for which of course he alone must bear criminal responsibility. Our discussion here turns, rather, on cases where a plurality of persons agrees to perpetrate one or more crimes for which they all bear responsibility and in addition one of them commits a further crime. Here, it is plain, the additional crime is premised on the existence of a concerted criminal purpose. In other words, there exists a causal link between the concerted crime and the 'incidental' crime: the former constitutes the preliminary *sine qua non* condition and the basis of the latter (although, with regard to the latter, only the participant that evinced knowledge and risk-taking shares the liability of the other participant who perpetrated the 'additional' offence). To clarify further the nexus between the two categories of crimes at issue, it could perhaps prove useful to insist on the distinction between abstract and concrete (or specific) foreseeability, suggested above (9.4.4).²²⁴

²²⁴ The fact that the incidental crime may be based on a nexus with the concerted crime was clearly emphasized by various courts. Suffice it to mention here the decision of the Italian Court of Cassation in *D'Ottavio and others* (decision of 12 March 1947). Two former Yugoslav war prisoners, who had escaped from a concentration camp, were suddenly surrounded by four local individuals near an Italian village. While one of them managed to flee, the other man was hit by two gunshots fired by D'Ottavio with his hunting rifle. The four aggressors then immediately left the scene. The injured man later died. The Teramo Court of Assize held that the accused had not intended to kill. With regard to the defendants other than D'Ottavio, it applied Article 116 of the Italian Criminal Code, providing that 'Where the crime committed is

The third response to the objections under discussion is directed to emphasize that the basic proposition suggested here on the basis of existing case law (that any participant in a JCE is also guilty for acts by another participant, under the conditions set out in the case law) is premised on the proposition that at the sentencing stage one must, however, take into account the different degrees of culpability of the participants. The lesser form of mens rea of the 'secondary offender' shall be taken into account by meting out a lighter sentence than that inflicted on the participant who materially perpetrated the offence not envisaged in the criminal plan. Both participants are guilty, but the one who did not

different from that willed by one of the participants, also that participant answers for the crime, if the fact is a consequence of his action or omission, if the crime committed is more serious than that willed, the penalty is decreased for the participant who willed the less serious offence.' On appeal, the Court of Cassation held that: 'The complaint concerning the application of Article 116 is also without merit. By virtue of this provision, where the crime committed is other than the one willed by one of the participants, also that participant is accountable for the crime if the criminal result is a consequence of his action or omission. In order for a criminal event to be held to constitute the consequence of the participant's action, it is necessary that there be a causation nexus—which is not only objective but also psychological—between the fact committed and willed by all the participants and the different fact committed by one of the participants. This is so because the participant's responsibility envisaged in Article 116 is grounded not in the notion of collective responsibility [...] but in the fundamental principle of concurrence of interdependent causes, upheld and specified in Articles 40 and 41 of the Criminal Code. By virtue of the latter principle all the participants answer for a crime both where they are the direct cause of the crime and where they are the indirect cause, in accordance with the canon *causa causae est causa causati* (the cause of a cause is also the cause of the thing caused; i.e. whoever voluntarily creates a situation bringing to, or resulting in, criminal conduct is accountable for that conduct whether or not he willed the crime). It is this concurrence of causes that also in this particular case of participation re-establishes the requirement of legal identity of the fact that is the precondition of the cooperation "in the commission of same crime". This identity is at least generic if not specific in that all the defendants have effectively contributed to the first crime that was the cause of the second. Here lies the nexus of objective causation: all participants have directly cooperated in the crime of attempted illegal detention of persons (provided for in Article 605 of the Criminal Code) by surrounding and chasing two fugitive prisoners of war, armed with a gun and a musket for the purpose of unlawfully capturing them. This crime was the indirect cause of the subsequent and connected event consisting of the rifle shot that D'Ottavio alone fired at one of the fugitives, a rifle shot that caused a wound followed by death (see Article 584 on manslaughter). There also exists a psychological causation in that all the participants shared the conscious will to engage in an attempt to unlawfully detain a person while foreseeing a possible different crime, as can be inferred from the use of weapons: it was to anticipate that one of them might have shot at the fugitives with a view to achieving the common purpose of capturing them.'

It would seem that the Court rightly stressed the causal link between the concerted and the not-envisaged crime, by pointing to the fact that this causal link related to the objective element of the crime at issue. However, there is ultimately a link with regard to the subjective element as well. The participant in the JCE to commit a specific crime or set of crimes is put in the position to foresee the further, unconcerted crime, on account of his joining the criminal enterprise to commit the agreed upon crime. Although he did not share the intent of the participant that engaged in the further criminal conduct, he had predicted that conduct and willingly taken the risk that it might occur. There lies his culpability. He could have prevented the further crime, or disassociated himself from its likely commission. His failure to do so entails that he too must be held guilty. See also Mannetti and others.

materially perpetrate the further crime must receive a less stiff sentence on account of his lesser culpability.

(B) Limitations of the category at issue

There exist two important qualifications to the application of the third class of JCE under discussion.

First, resorting to such class would be intrinsically ill-founded when the crime committed by the 'primary offender' requires special or specific intent (*dolus specialis*), that is, the crime charged is one of genocide, persecution, or aggression (it is common knowledge that for genocide the intent to destroy a 'protected group' in whole or in part is required; persecution presupposes the intent to discriminate on one of the requisite grounds; aggression, at least in the opinion of some commentators,²²⁵ is grounded in the intent to appropriate a foreign territory or to obtain economic advantages, or to interfere with the internal affairs of the victim state; see above, 7.3.3(B)). In these cases the 'secondary offender' may not share—by definition—that special intent (otherwise one would fall under the first and second class of JCE), even though entertaining such intent is a *sine qua non* condition for being charged with the crime. He may therefore not be accused of such crime under the doctrine at issue. This proposition is based on two grounds. First, on a logical impossibility: one may not be held responsible for committing a crime that requires special intent (in addition to the intent needed for the underlying crime) unless that special intent can be proved, whatever mode of responsibility for the commission of crimes is relied upon (this leaves out aiding and abetting, where it suffices to prove that the offender has made a substantial contribution to the commission of the crime by others, had knowledge of the crime, and intentionally provided assistance to its perpetration). Secondly, admittedly whoever is liable under the third category of JCE has a distinct *mens rea* from that of the 'primary offender'; nevertheless, as the 'secondary offender' bears responsibility for the same crime as the 'primary

²²⁵ S. Glaser, 'Quelques remarques sur la définition de l'agression en droit international pénal' in *FPfsc/irif fir Th. Rittler* (A. nlen: Verlag Scientia, 1957), at 388-93; *Idem* 'Culpability en droit international pénal', in 99 *Hague Recueil* (1960-1), at 504-5.

offender,' the 'distance' between the subjective element of the two offenders must not be as drastic as in the case of crimes requiring special intent. Otherwise the crucial notions of 'personal culpability' and 'causation' would be torn to shreds²²⁶ For such crimes the 'secondary offender' could only be-charged— it is submitted—with aiding and abetting the main crime (needless to say, subject to the condition that the requirements of aiding or abetting the commission of one of the three classes of aforementioned crimes are met).

Let us now consider the second qualification to the application of the third class of JCE under discussion. Mature legal systems make it possible to take account of the lesser degree of culpability of the 'secondary offender' by qualifying his culpability through a charge less than that against the 'primary offender'. If the latter has engaged in murder while conducting a concerted unlawful deportation of civilians, the 'secondary offender' could be accused of manslaughter. This different charge would take into account the lesser degree of culpability of that offender. Unfortunately ICL is a rudimentary body); of law, which allows for such sophisticated distinctions or gradations only to a very limited extent. In short, one cannot charge a lesser offender with an offence belonging to a different category of international crimes; for instance, one cannot charge the 'primary offender' with murder as a crime against humanity and the 'secondary offender' with murder as a war crime. This would indeed be erroneous, for the two categories

²²⁶ In 2004 the ICTY AC took a contrary view in *Brdanin*, with regard to genocide, [n its Decision on Interlocutory Appeal of 19 March 2004 it held that 'provided that the standard applicable to that head of liability [the third category of JCE], i.e. "reasonably foreseeable and natural consequences" is established, criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise' (§9). It went on to say that "The Trial Chamber erred by conflating the mens rea requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused' (§10). The AC thus reversed a prior decision of the TC (*Brdanin*, Decision for Acquittal Pursuant to Rule 98 bis, 28 November 2003), which had held (correctly, in my opinion) that the specific intent required for genocide 'cannot be reconciled with the mens rea required for a conviction pursuant to the third category of ICE. The latter consists of the Accused's awareness of the risk that genocide would be committed by other members of the)CE. This is a different mens rea and falls short of the threshold needed to satisfy the specific intent required for a conviction for genocide under Article 4(3)(a) (of the ICTY Statute)]' (§57). In 2005, in *Kvočka and others*, the same AC limited the need for sharing the special intent to the first category of ICE. It 'affirmed' 'the Trial Chamber's conclusion that participants in a basic or systemic form of joint criminal enterprise must be shown to share the required intent of the principal perpetrators. Thus, for crimes of persecution, the Prosecution must demonstrate that the accused shared the common discriminatory intent of the joint criminal enterprise. If the accused does not share the discriminatory intent, then he may still be liable as an aider and abettor if he knowingly makes a substantial contribution to the crime' (§110). This proposition was taken up by an ICTR TC in *Simba* (at §388).

show different features; the offences at issue belong either to one category (for instance, crimes against humanity) if the requisite conditions are met (chiefly, the existence of a context of widespread or systematic practice), or to the other. Furthermore, laying different charges within the same category of international crime is logically possible only with regard to some classes of underlying offences. As classes of offences where a gradation is possible, one can mention: murder and man- slaughter (as a war crime, or a crime against humanity); willful killing (as a grave breach); and unlawful killing (as a war crime in an international armed conflict);²²⁷ rape and sexual violence (as a war crime or a crime against humanity); and torture and inhuman or degrading treatment (as a war crime or a crime against humanity). For other underlying offences it would seem difficult to apply such gradations of culpability and hence of charging.

(C) Case law

The first case where this category of ICE was raised is Tadic (Af, 1999). According to the Prosecution the TC had erred in finding that the accused could not be charged with the killing of five men in the village of Jaliscic, when he participated in the attack on that village and the village of Sivci on 14 June 1992, because there was no evidence showing that he had killed or taken part in the killing of those five men. For the Prosecution 'the only conclusion reasonably open from all the evidence is that the killing of five victims was entirely predictable as part of the natural and probable consequences of the attack on the villages of Sivci and Jaskici on 14 June 1992' (§175). The Defence argued instead that the TC correctly found that 'it was a possibility that the five victims in Jaskici were killed by another, distinct group of armed men, especially as nothing [was] known as to who shot the victims or in what circumstances' (§176). As for the Prosecutions common purpose submission, the Defence contended that 'it would have to be shown that the common purpose in which the Appellant allegedly took part included killing as opposed to ethnic cleansing by other means' (§177).

²²⁷ This proposition is based on the assumption that grave breaches may only be committed in international armed conflicts, a position taken in 1995 by the ICTY AC in Tadić (IA), but probably no longer valid under current international customary law.

The AC upheld the Prosecution's submissions after engaging in an elaborate outline of the notion of common purpose or JCE in ICL.²²⁸ Based on this notion, the AC found that in the case at issue the defendant had taken part in a common plan to commit inhumane acts against the non-Serb civilian population in the Prijedor region in 1992. He was an armed member of the armed group that took part in the attack and committed several crimes. He must have been aware 'that the actions of the group of which he was a member were likely to lead to [...] killings, but he nevertheless willingly took that risk' (§232). The AC therefore found the defendant guilty. Subsequently the TC, to which the case had been remitted for sentencing purposes, held that for the murder of the five Muslims, Tadic was simultaneously guilty of a grave breach, a war crime, and a crime against humanity. It sentenced him to 24 years' imprisonment for the grave breach and the war crime and 25 years for the crime against humanity, with the sentences to be served concurrently²²⁹ (in its previous judgment, where the murder of the five Muslims had not been imputed to Tadic, the TC had sentenced him to 20 years' imprisonment).²³⁰ The AC subsequently reduced the sentence to 20 years' imprisonment, both because it held the previous sentence to be excessive with regard to the relatively minor position of the accused, and because in its view 'there is in law no distinction between the seriousness of a crime against humanity and that of a war crime'. It was consequently wrong to consider the same offence as more grave if regarded as a crime against humanity than as a war crime.²³¹

²²⁸ With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category [...], personal knowledge of the system of the treatment is required (whether proved by express testimony for a matter of reasonable in view inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the members of the group and (ii) the accused willingly took that risk' (§228).

²²⁹ 23 ICTY, TC, Sentencing Judgment, §§15-18, 27-9 and 32 E and G.

²³⁰ 24 ICTY, TC, Sentencing judgment.

²³¹ 25 ICTY, AC, §§55-8, 69 and 76(3).

The question of this category of criminal liability arose again in Krstic, although only tangentially, before the TC.²³² The essential features of the category, as set out in Tadic (A), 1999) were restated by the ICTY AC in Vasiljevic (§99), Kvočka and others (§83), as well as in Babic (§27). In Stakic the AC, after reversing the TCs ruling based on the notion of coperpetratorship', held that the accused, in holding important positions such as President of the Crisis Staff, had participated in a JCE to commit crimes of persecution, forced displacement, and ill-treatment in detention camps against Muslims in the Prijedor area in Bosnia-Herzegovina. It then held that the accused bore criminal liability under the third category of JCE for crimes not agreed upon, namely killings in detention camps, transportation to camps of the non-Serb civilian population, and killings by the Serb armed military and police forces. The AC concluded that the accused was responsible under the third head of JCE for the crimes of murder (as a war crime and a crime against humanity) and extermination as a crime against humanity. It is notable that the Chamber insisted on the requirement of *dolos eventualis* and held, based on the findings of the TC, that this form of *mens rea* did exist in the case at issue (§§93-7).

An interesting application of the third category of JCE was made by an ICTY TC in Flago Jevic and Jokic. After noting that where the objective of a JCE changes in time, a new and distinct JCE may be established, the TC pointed out that, with

²³² As pointed out above, the Chamber held that the defendant had participated in a JCE to commit genocide. Nevertheless, the Chamber relied upon the third category of criminal enterprise with regard to some crimes committed against the persons who had escaped the massacre. It held that it was not proved that various crimes committed against Muslims fleeing Srebrenica had been agreed upon in the criminal plan. They were nevertheless to be imputed to the defendant—so held the Chamber—because they were the foreseeable consequence of the policy of forcible expulsions that was part of the criminal plan: 'The Trial Chamber not, however, convinced beyond reasonable doubt that the murders, rapes, beatings and abuses committed against the refugees at Potocari were also an agreed upon objective among the members of the joint criminal enterprise. However, there is no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign. Furthermore, given the circumstances at the time the plan was formed. General Krstic must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection. In fact, on 12 July, the VRS organised and implemented the transportation of the women, children and elderly outside the enclave; General Krstic was himself on the scene and exposed to firsthand knowledge that the refugees were being mistreated by VRS or other armed forces' (§616)

the establishment of such new JCE a participant in the enterprise shall not incur responsibility for criminal acts beyond the scope of the enterprise in which he had agreed to participate, but only for those acts that are 'natural and foreseeable consequences', thereby falling under the third category of JCE (§701).

Finally, it should be mentioned that the ICTY AC has placed a broad interpretation on the category of JCE at issue. In 2004 in *Brdanin* it held that this category of JCE can also apply when acts of genocide are committed by the 'primary offender'.²³³ In 2006, in *Karemera and others* the ICTR AC held that this category of criminal liability can also cover crimes committed by fellow participants 'in a vast joint criminal enterprise' where crimes committed by the fellow participants are 'structurally or geographically remote from the accused'.²³⁴ The same view was taken in 2007 by the ICTY AC in *Brdanin* with regard to the category of JCE we are discussing (AJ, §§420-5).

3.14.5 THE QUESTION OF WHETHER THE 'PHYSICAL PERPETRATOR' SHOULD ALSO BE PART OF THE JCE

As we saw above (9.4.2(B)), in *Brdanin* the issue was raised of the relations between members of a JCE and persons not part to the JCE who nevertheless carry out crimes in execution of the JCE (deportation and forcible transfer of Bosnian Muslim or Croat civilians). The question is as follows: do such perpetrators (henceforth physical perpetrators) need to share the joint criminal purpose for the members of the JCE to be answerable for the crimes perpetrated? The TC answered in the negative (TJ, §§344-56), while the AC in the affirmative (AJ, §§410-19, 426-32). It is therefore appropriate to dwell on the question of the relations between members of a JCE and organized groups that commit crimes in execution of a common criminal purpose.

²³³ *Brdanin*, Decision on interlocutory Appeal, at §§9-10.

²³⁴ ICTR AC, *Karemera and others*. Decision on Jurisdictional Appeals: Joint Criminal Enterprise, at §§11-18.

Normally members of a JCE make up fairly small groups and are persons operating at the same level, even though in different capacities. Hence no serious problem arises: each of them is responsible for the concerted criminal actions, even if such actions are performed only by one member of the JCE. However, there may be cases where the members of the JCE constitute a larger group and form part of a hierarchically constituted organization or structure. This is typically the case for ICE II (participation in a common criminal plan within an institutional framework). Here, however, only those who knowingly make a substantial contribution to the pursuit of common criminal purposes are personally liable. Hence for all of them it is required that they be part to the JCE. The problem becomes complicated when the criminal plan is agreed upon by a number of members of a political or military group, and one of these members carries out the common criminal purpose by ordering or instigating subordinate military units outside the JCE to commit some or all of the crimes envisaged in the JCE.

One should distinguish between the legal position of (a) the member of the JCE that orders or instigates outsiders to commit the crimes; and (b) that of the other members of the JCE.

To my mind the member of the JCE ordering or instigating the commission of crimes may be responsible under two distinct heads of liability. He is responsible for (1) the JCE to commit other crimes that may have been perpetrated by himself as well as other members of the JCE; and for (2) ordering and instigating the crimes perpetrated by the subordinates. These subordinates need not, of course, share the common criminal purpose (this is what occurred in *Brđanin*, according to the TC, which rightly found the defendant guilty of ordering and instigating the crime 'of deportation and forced expulsion of Bosnian Muslims and Croats, perpetrated by the army: §§359-69). If brought to trial, such subordinates are liable for the perpetration of the crime at issue.

Let us now move on to situation (b). Here the following question must be asked: does a member of the JCE other than the member that orders or instigates

subordinate troops or paramilitary units or police officers (not part to the JCE) to perpetrate crimes in consonance with the criminal purposes agreed by members of the JCE, bear responsibility for the crimes perpetrated by the executioners? The answer may only be given in light of general principles of international criminal law, in particular the principle of personal criminal responsibility (indeed the judicial precedents relied upon by the AC in *Brdanin* (A) 99393-404) are not germane to the question under discussion).²³⁵ In accordance with these principles the member of the JCE may only be held responsible for those crimes if (i) when concerting the crime to be perpetrated in execution of the JCE he had agreed to the physical perpetration of crimes by persons who, albeit outside the JCE, could, however, act upon the orders of one of the members of the JCE (in this case JCE I would be applicable); or (ii) he anticipated the risk that another member of the JCE might order or instigate persons outside the JCE to perpetrate crimes and willingly ran that risk (ICE III). It would not be sound to

²³⁵ They are two cases brought before US Military Tribunals sitting at Nuremberg: *Altstotter and others* (so-called *lustice case*) and *Greifelt and others* (so-called *RL'SHA case*). As the AC admitted in *Brdanin* (AI, 6393), in neither case did the Tribunals use the expression 'ICE'. What matters, however, is that neither Judgment relied upon the notion of JCE. In the former, faced with crimes planned, ordered or committed by member? ur the Ministry of Justice, the Tribunal adopted traditional notions of criminal responsibility, as is apparent from the following passage: 'The defendants are not now charged with conspiracy as a separate and substantive offense, but it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of lews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency. Some of the defendants took part in the enactment of laws and decrees the purpose of which was the extermination of Poles and lews in Germany and throughout Europe. Others, in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior. The overt acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged. The material facts which must be proved in any case are: (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime' (1063; emphasis added). The reason why the Tribunal did not discuss the mental state of those who executed death sentences and other criminal acts agreed upon and planned by the defendants is simply that those executioners so acted following orders by the defendants: who were hence responsible not for ICE to commit persecution but for ordering persecution. Similarly in *Greifelt and others* the Tribunal convicted the defendants of ordering and instigating the kidnapping of children of foreign nationals, taking away foreign infants, executing in concentration camps foreigners and so on. As the Tribunal put it: '[i]t is no defense for a defendant to insist, for instance, that he never evacuated populations when orders exist, signed by him, in which he directed that the evacuation should take place. While in such a case the defendant might not have actually carried out the physical evacuation in the sense that he did not personally evacuate the population, he nevertheless is responsible for the action, and his participation by instigating the action is more pronounced than that of those who actually performed the deed' (153).

hold the member at issue liable even when the agreement (or consent) or the anticipation and deliberate taking of risk are lacking. In such case the basic precondition of liability for JCE would be lacking, and to hold the member responsible for the crimes committed by the physical perpetrator would be contrary to the principle of personal criminal responsibility.²³⁶

Of course, also in the case I have just discussed the member of the JCE that ordered or instigated subordinates is responsible for ordering and instigating the crimes, although he did so in consonance with or in execution of a JCE (which in this respect would not be relevant to the establishment of guilt of the accused, whereas it might perhaps have some relevance to the setting of penalty).

3.14.6 THE DIFFERENCE BETWEEN ICE AND AIDING AND ABETTING

It has been objected that the doctrine of JCE does not clearly distinguish between the responsibility of a participant in JCE and that of an aider and abettor. Moreover, that doctrine would even go so far as to foist a greater weight upon a person responsible for aiding and abetting than on a participant in a JCE. In fact a major difference between the two categories of persons does exist. It lies in their respective mens rea (as for actus reus, in both cases a 'substantial' contribution is required, as I shall point out below with regard to JCE). The participant in a JCE (i) takes part in a common criminal plan or purpose and shares a common intent to perpetrate a crime (murder, forced expulsion, persecution, and so on); or (ii) by willingly and knowingly participating in an institutional criminal framework, expressly or implicitly evinces his sharing the criminal conduct in which that institutional framework engages; or else (iii) in addition to adhering to a criminal plan and sharing the intent to commit a crime, willingly runs the risk that another participant may intentionally perpetrate a further crime that the former had foreseen.

In contrast, as we shall see when discussing aiding and abetting (see *infra*, 10.1), he who aids and abets does not share, either at the outset or later, the criminal

²³⁶ For a similar view, see the Partly Dissenting opinion of Judge Shahabuddeen in *Brdanin* (AJ) (§§4 The contrary view is advanced by Judge Meron in his Separate Opinion in the same case (513-8)

intent of the perpetrator, although he is cognizant that the perpetrator intends to commit a crime; the aider and abettor only intends to assist the perpetrator in the commission of a crime. This is why, in principle, the criminal liability of the aider and abettor is more tenuous (or less weighty) than that of a participant in a common criminal enterprise. As the ICTY AC put it in a number of cases, aiding and abetting 'generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise'.²³⁷

It should be added that, according to ICTY case law, it would be wrong to speak of 'aiding and abetting a JCE', for whenever a person intends to assist in the commission of crimes by a group of persons involved in a JCE, that person should more correctly be held liable for participation in the JCE.²³⁸

3.14.7 TO WHAT EXTENT CAN THE ICC RELY UPON THE DOCTRINE OF JCE?

The ICC Statute does not contain a provision that regulates JCE in detail as a mode of responsibility. That such form of criminal liability is implicitly permitted under the Statute can however be inferred from Article 25(1),²³⁹ which generically

²³⁷ Krnojelac (Af, §75), Vasiljevic (A), §102), Kgotka and others (A], §92).

²³⁸ ICTY AC, Milutinovic and others. Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction over Joint Criminal Enterprise, §20; Kgotka and others (A], §91).

²³⁹ This provision stipulates that:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime' (emphasis added)

states that criminal responsibility for any of the crimes covered by the Statute is incurred by anybody 'committing a crime' 'jointly with another person'. This provision, in addition to co-perpetration (the same crime is committed by a plurality of persons, who perform the same criminal act; see above, 9.3), also covers JCE. However, the ICC Statute goes further, for, although in envisaging a different mode of liability (outsider's contribution to a JCE; see below), it explicitly refers to the 'commission or attempted commission of such a crime [within the jurisdiction of the Court] by a group of persons acting with a common purpose' (Article 25(3)(d)).

As for the mens rea required for ICE under the Statute, one can refer to the general provision of Article 30 (on the mental element of the crimes covered by the Statute), which requires 'intent or knowledge'. Should one hold the view that consequently the Statute of the ICC always requires intent as the necessary subjective element necessary for a finding of criminal liability, whatever the mode of responsibility, it would follow that the ICC, while generally empowered to rely upon the doctrine of JCE, would be barred from applying the third category referred to above.²⁴⁰

However, Article 30, before setting out the two mental elements of intent or knowledge, contains a general clause ('unless otherwise provided') that leaves other subjective frames of mind unaffected, so long as they are provided for or required by other provisions of the Statute or by customary international law.²⁴¹ Hence the contention can be made that *dolus eventualis* or recklessness for the third form of the JCE is not excluded by the ICC Statute.

This interpretation would be justified by the need to punish criminal conduct that otherwise would not be regarded as culpable. In addition, it would not be contrary to the principle of personal culpability, for in any case the person at issue (i) would be guilty of intentionally participating in a criminal purpose or plan; (ii) his

²⁴⁰ It would seem that this is the view taken by the ICC Pre-Trial Chamber in Lubanga (§§322-67).

²⁴¹ See G. Werle and F. Jessberger, 'Unless Otherwise Provided' in 3 IICf (2005), ssds.

mens rea concerning the additional, not previously concerted crime, would have to be proved by the Prosecution; and (iii) his lesser culpability would have to be taken into account at the sentencing stage.

It should be added that, contrary to what various authors, including the present one, have either implicitly or expressly contended,²⁴² the gist of Article 25(3)(d) is the regulation not of JCE but rather of a different mode of responsibility. This consists in the fact that a person outside the criminal group committing (or attempting to commit) a crime contributes to the perpetration of such crime without being a member of the criminal group. It would seem that such contribution is different from aiding and abetting. Indeed, the aider and abettor intends to assist in the commission of a crime by others but does not share the criminal intent of the perpetrator (see 10.1 and 9.4.6). Here, instead, the 'outside contributor' either (a) intends to further the criminal action (hence is aware of and shares the criminal intent of the group), or (b) simply knows, that is, is aware of, the criminal intent of the group. In the former instance, the 'outside contributor', by sharing the criminal intent of the group only distinguishes himself from members of the JCE in that he is not part of the criminal agreement (neither at the moment when such agreement is made nor later). In the latter instance, that is in the category (b), the 'outside contributor' distinguishes himself from the aider and abettor only in that he aides and abets a whole criminal group (that is, a multiplicity of persons) and not a single perpetrator. Otherwise, there is no distinction between the two classes of persons assisting in the commission of crimes by others.

Probably the inclusion of this new mode of liability is justified by its origin, namely the fact that the provision was taken up from Article 2(3) of the 1997 International Convention on the Suppression of Terrorist Bombing. The needs of the fight

²⁴² For instance see W.A. Schabas, *An Introduction to the International Criminal Court*, 3rd e (Cambridge: Cambridge University Press, 2007), at 211-13; K. Ambos, *Joint Criminal Enterprise a Command Responsibility** in *5//C/(2007)*, 172-3; A. Cassese, **The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise**, *ibidem*, at 132. See also the ICTY A; in Tadić (1999, at §222). On Article 25(3)(d) see also K. Ambos in O. Triffterer (ed), *Commentary*, at 483-6 as well A. Eser, Cassese, Gaeta, Fones (eds), *The Rome Statute*, 1,802-3.

against widespread and increasingly dangerous terrorist criminality warranted the expansion of responsibility to these forms of 'external assistance'. The ICC Statute rather uncritically restated that provision of the Terrorist Bombing Convention.²⁴³

²⁴³ The category of 'outsider contributor' to ICE is in some respects not dissimilar from the category 'external participation in mafia crimes' (*concorso esterno in associazione mafiosa*), set forth by Italian courts (see P. L. Vigna, 'Fighting organized Crime, with particular reference to Mafia Crimes in Italy', in 4 *J* (2006), 526-7; according to this author the criminal offence at issue covers cases where a person, although not a part and parcel of the structure of a criminal organization and free from any link of subjection to the association, nevertheless provides the association with a contribution which is specific, conscious and voluntary. Such contribution must however be causally relevant to the strengthening of the criminal association and aimed at the implementation (albeit partial) of the criminal plan.' (ibidem).

CHAPTER 4

CONCEPT OF SOVEREIGN IMMUNITY (THE INTERNATIONAL CODIFIED LAW AND INTERNATIONAL CUSTOMARY LAW PERSPECTIVE)

4.1 Introduction

Foreign sovereign immunity belongs without doubt to the traditional domains of public international law and has received wide attention within academia and practice over the last 200 years. But the rise of international human rights has called the fairly settled doctrine of relative sovereign immunity – also known as the relative theory of sovereign immunity – into question. If states are bound by human rights and if the rule of law has any meaning in international law, why are states exempted from jurisdiction within the territory of another state? There are, of course, numerous reasons which support sovereign immunity – historical as well as more practical ones. But the alleged inconsistency between protecting human rights on the one hand and granting sovereign immunity on the other has found powerful support, particularly among human rights activists or idealists, as they have sometimes been called. In Europe, it was above all the *Pinochet* case²⁴⁴ that divided academia as well as practice; in the US, this happened with the case of *Princz v. Federal Republic of Germany*.²⁴⁵ Both sides of the great divide claim that their approach reflects the law as it stands. The idealists argue that with regard to international crimes and fundamental human rights states are obliged to deny sovereign immunity, whereas the (alleged) realists emphasize the indispensable importance of upholding sovereign immunity for maintaining good and peaceful relations among states. Immunity reflects a basic state right based on the respect for a state's sovereignty and independence.

The conflict between these incompatible conceptions has occupied not just national courts, which are naturally the first ones to decide matters of sovereign immunity. The ICJ in *The Arrest Warrant* case²⁴⁶ and the European Court of

²⁴⁴ *Ex Parte Pinochet*, House of Lords, 24 Mar. 1999, 38 ILM (1999) 581

²⁴⁵ *Princz v. Federal Republic of Germany*, 26 F. 3d 1166 (DC Cir. 1994).

²⁴⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep 3. A similar case also brought to the ICJ by the Democratic Republic of Congo is still pending; see *Certain*

Human Rights (ECtHR) in *Al-Adsani*²⁴⁷ and *McElhinney*²⁴⁸ have addressed certain aspects of the problem as well: the immunity of high-ranking state officials from criminal proceedings in another state in cases of war crimes and crimes against humanity (*The Arrest Warrant* case), or whether states are under an obligation to grant access to their courts if the foreign state is being accused of torture (as in *Al-Adsani*). In both cases the courts argued in favour of sovereign immunity. The ICJ in particular accepted that a right to sovereign immunity exists. It thus did not come as a surprise when on 23 December 2008 Germany instituted proceedings against Italy before the ICJ based on a violation of its (alleged) right to sovereign immunity in civil proceedings.²⁴⁹

This legal action is the direct response to several decisions of the Italian *Corte di Cassazione* (Supreme Court). In *Ferrini* the Court awarded payments in favour of Mr. Ferrini, an Italian national, who was deported from Italy and forced into slave labour in Germany in 1943.²⁵⁰ The *Distomo* case concerns the recognition of a Greek judgment which ordered Germany to pay damages for a massacre committed against the civilian population of the Greek village Distomo during World War II.²⁵¹ The *Corte di Cassazione* denied Germany a right to sovereign

Criminal Proceedings in France (Republic of the Congo v. France), application filed on 9 Dec. 2002, available at: www.icj-cij.org.

²⁴⁷ App No 35763/97, *Al-Adsani v. UK*, ECHR, 21 Nov. 2001, 123 ILR (2001) 24.

²⁴⁸ App No 31253/96, *McElhinney v. Ireland*, ECHR, 21 Nov. 2001, 123 ILR (2001) 73.

²⁴⁹ *Jurisdictional Immunities of the State (Germany v. Italy)*, 23 Dec. 2008, available at: www.icj-cij.org.

²⁵⁰ *Ferrini v. Federal Republic of Germany*, Corte Suprema di Cassazione (Italian Supreme Court), 5044/2004, English translation available in 128 ILR (2006) 658; see also Gattini, 'War Crimes and State Immunity in the Ferrini Decision', 3 *J Int'l Criminal Justice* (2005) 224; Focarelli, 'Denying Foreign State Immunity for Commission of International Crimes – The Ferrini Decision', 54 *ICLQ* (2005) 951; De Sena and De Vittor, 'State Immunity and Human Rights – The Italian Supreme Court Decision on the Ferrini Case', 16 *EJIL* (2005) 89.

²⁵¹ The Distomo massacre was one of the worst crimes committed against the civilian population in Greece during World War II. On 10 June 1944, SS troops who were integrated into the German *Wehrmacht* entered the Greek village of Distomo. They came to take revenge for a partisan attack, even though they had no proof that the village was either directly or indirectly involved in that attack. Those surviving the massacre reported that the Germans randomly killed every person they could get hold of and burned the village to the ground. Members of the Red Cross who went to Distomo days after the massacre found bodies hanging from the trees lining the roads outside the village. For a brief description of the massacre see M. Mazower, *Inside Hitler's Greece* (1993), at 213–215. The Distomo litigation history is quite remarkable. Two years after the proceedings had been instituted, the Court of Leivadia held Germany liable for the Distomo massacre, awarding damages in the amount of approximately \$30 million; *Prefecture of Voiotia v. Federal Republic of Germany*, Court of 1st Instance Levadia, 137/1997; an English translation is provided by Gavouneli, 'War Reparation Claims and State Immunity', 50 *Revue Hellénique de Droit International*

immunity based on the severity of the crimes committed during the war. It therefore did what the plaintiffs in *Al-Adsani* and *McElhinney* had asked the domestic courts in the UK and Ireland to do. As a consequence, the ICJ must decide whether states are allowed to deny sovereign immunity or whether the denial violates international law. The focus of the case thus differs completely from that of *Al-Adsani* and *McElhinney*. In these cases, the ECtHR had to decide whether states were under an obligation to deny sovereign immunity because they would otherwise violate the plaintiff's rights under the European Convention on Human Rights (ECHR).²⁵² According to the ECtHR, the convention would have been violated if there had been a duty to deny sovereign immunity under customary international law. But, as the Court denied such a duty, it held that the UK did not violate the convention. The ICJ, however, does not have to consider the existence of any duty to deny immunity in the present case. Quite the contrary, it must decide whether Italy, by denying Germany's immunity in *Ferrini*

(1997) 595, at 599 ff; for a short summary of the judgment see Bantekas, 'Case Report: Prefecture of Voiotia v. Federal Republic of Germany', 92 *AJIL* (1998) 765. After the Greek Supreme Court confirmed the judgment in May 2000, it became final; *Prefecture of Voiotia v. Federal Republic of Germany*, Areios Pagos, 11/2000, 4 May 2000, 129 ILR (2007) 514. But the efforts to enforce the judgment eventually failed because the Minister of Justice denied his approval – a necessary prerequisite for executing a judgment against a foreign state under Greece law (Art. 923 of the Code of Civil Procedure). The Athens Court of Appeal upheld this decision and a complaint lodged with the European Court of Human Rights was equally unsuccessful: App. No. 59021/00, *Kalogeropoulou v. Greece and Germany*, ECtHR, 12 Dec. 2002, 129 ILR (2007) 537. Finally in 2003, the German Federal Supreme Court rejected the enforcement of the Greek judgment in Germany, *Distomo Massacre case*, Bundesgerichtshof, III ZR 245/98, 26 June 2003, 129 ILR (2007) 556; see also Pittrof, 'Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the Distomo Case', 5 *German LJ* (2004) 15. The German Constitutional Court in 2006 affirmed the decision of the *Bundesgerichtshof*, BVerfG, 2 BvR 1476/03, 15 Feb. 2006. In the meantime the Special Supreme Court of Greece indirectly overruled the *Areios Pagos* in parallel proceedings granting immunity to Germany; *Margellos and Others v. Federal Republic of Germany*, Anotato Eidiko Diskastirio (Greek Special Supreme Court), 6/2002, 129 ILR (2007) 526. This development led Dörr to conclude that the matter was settled; Dörr, 'Staatliche Immunität auf dem Rückzug?', 41 *Archiv des Völkerrechts* (2003) 201, at 209. But when the *Corte di Cassazione* issued its *Ferrini* decision, the Distomo plaintiffs instituted proceeding in Italy to execute the Greek judgment against Germany there. Their efforts have been successful so far: see Corte di Cassazione, 14199, 29 May 2008; German translation available at 27 *NVwZ* (2008) 1100. German commentators in particular criticized the judgment harshly: see, e.g., Stürmer, 'Staatenimmunität und Brüssel I-Verordnung – Die zivilprozessuale Behandlung von Entschädigungsklagen wegen Kriegsverbrechen im Europäischen Justizraum', 28 *IPRax* (2008) 197, at 205, holding that states are deprived of their rights (*Rechtslosigkeit*), or Geimer, 'Los Desastres de la Guerra und das Brüssel I-System', 28 *IPRax* (2008) 225, at 227, complaining about the disillusioning conclusion to be drawn from the judgments.

²⁵² Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, ETS No. 5, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 11 May 1994, ETS No. 155.

and recognizing the Greek *Distomo* judgment, has violated international law because it was under an obligation to grant immunity.²⁵³

The intuitive basis for such an obligation is a specific state right to sovereign immunity. But does such a right exist? Academia and practice by national and international courts seem to be divided on this question. There are those who conceptualize sovereign immunity as a default rule which applies as long as states have not accepted any limitations,²⁵⁴ whereas others reject its legally binding effect under customary international law altogether.²⁵⁵ But both conceptions neglect the current realities of international law. States accept sovereign immunity as a legally binding concept, but only on a very abstract level.²⁵⁶ They agree on the general idea of immunity, but disagree on the extent to which they actually must grant immunity in a specific case. I therefore argue that sovereign immunity is best understood not as a specific rule or something based on the comity of the forum state, but as a legally binding principle of

²⁵³ The ICJ's decision in *The Arrest Warrant* case is of no immediate help either. It definitely stipulates a right to immunity. But this specific right is limited to a Foreign Minister while being in office for criminal proceedings in another country. In addition, the Court emphasized 'that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. . . . Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility': see *Arrest Warrant*, *supra* note 3, at para. 60.

²⁵⁴ Even those who deny sovereign immunity in case of fundamental human rights violations (at least when occurring on the territory of the forum state), such as the *Areios Pagos* in *Distomo* or the *Corte di Cassazione* in *Ferrini*, assume that states in general have a right to claim immunity under customary international law, but either that this right collides with fundamental human rights or that international law accepts restrictions of this right: *Ferrini*, *supra* note 7, at 664–674; *Distomo*, *Areios Pagos*, *supra* note 8, at 516–521. The whole debate has therefore circled round the question to what extent international law either allows or requires exceptions to the default rule: see, e.g., H. Fox, *The Law of State Immunity* (2nd edn, 2008), discussing the character of sovereign immunity as a rule at 13–25 and possible exceptions to this rule at 533–598; see also C. Appelbaum, *Einschränkung der Staatenimmunität in Fällen schwerer Menschenrechtsverletzungen* (2007). Conceptualizing immunity and its limits as a rule–exception relationship is also supported by the existing international conventions and domestic laws on foreign sovereign immunity. The European Convention on State Immunity, see *infra* note 14, and the UN Convention on Jurisdictional Immunities of States, see *infra* note 16, follow this approach as well as the US Foreign Sovereign Immunity Act, *infra* note 17, and the UK State Immunity Act, *infra* note 18.

²⁵⁵ Especially the US Supreme Court in its recent decisions in *Republic of Austria v. Altmann*, 541 US 667 (2004) and *Dole Food Co. v. Patrickson*, 538 US 468 (2003) has referred to comity as the only basis for sovereign immunity in international law.

²⁵⁶ See the conclusion of Dellapenna, 'Foreign State Immunity in Europe', 5 *NY Int'l L Rev* (1992) 51, at 61; R. Jennings and A. Watts (eds), *Oppenheim's International Law* (1992), I/1, at 342–343 also point out that beyond a general understanding of sovereign immunity, national decisions differ in both detail and substance.

international law. The distinction between rule and principle is more than a mere formality. It determines how we approach the matter and which questions we ask, because a principle, in contrast to a specific rule, allows states to determine the scope of sovereign immunity within their domestic legal orders confined by the limits set by international law. The question is ‘What are these limits?’ and not ‘Have states accepted exceptions to sovereign immunity and to what extent?’

In order to substantiate my claim that sovereign immunity must be conceptualized as a principle and not as a rule, it is necessary, after a few introductory remarks (section 2), to revisit the classical discussion of possible exceptions to the alleged rule of sovereign immunity, namely the private–public distinction (section 3), the tort exception (section 4), (implied) waivers to sovereign immunity (section 5), and the ‘hierarchy of norms’ argument (section 6), as well as the ‘comity approach’ (section 7). The analysis will reveal that current state practice is too diverse to establish sovereign immunity as a specific rule obliging states to grant sovereign immunity to foreign states as a default rule. But it will also show that states actually agree on the concept of foreign sovereign immunity, at least on a very abstract level. Denying immunity any binding effect is thus incompatible with the actual conduct of states. This result will be applied to the general discussion on principles and rules, thereby trying to verify the proposition that sovereign immunity is a principle of public international law (section 8). The article will conclude by suggesting which questions the ICJ should discuss when deciding the case on *Jurisdictional Immunities of the State* between Germany and Italy.

4.2 Sovereign Immunity – Some Basics

Sovereign immunity always had two dimensions – a national and an international one. So far, the international community has witnessed several attempts to codify the law on sovereign immunity, but until now only the European Convention on State Immunity (ECSI) has entered into force.²⁵⁷ However, even this Convention has received only eight ratifications since 1972, with Germany having been the

²⁵⁷ European Convention on State Immunity, 16 May 1972, CETS No. 074, 11 ILM (1972) 470.

last state to ratify it in 1990.²⁵⁸ The United Nations have, of course, also worked on the matter – for several decades. Still, since its adoption in December 2004, the UN Convention on Jurisdictional Immunities of States (UNCJIS) has not been ratified by enough states in order to become effective.²⁵⁹

Parallel to these codification efforts on the international level, some states enacted national legislation on sovereign immunity, most importantly the US Foreign Sovereign Immunity Act (FSIA).²⁶⁰ Other states include the UK, Australia, Canada, and South Africa.²⁶¹ States that for whatever reason have forgone the opportunity to pass national legislation rely on international custom to determine the scope of immunity which foreign states might claim. In doing so, most states – or, to be more precise, their courts – assume that sovereign immunity serves as the basic rule until the existence of an exception has been proven.

4.3 The Private–Public Distinction

At first glance, the historical developments appear to support this idea: immunity as a shield which screens foreign states from the jurisdiction of the forum state unless it is penetrated by international custom. While states once enjoyed unqualified exemptions from the jurisdiction of other states, this absolute approach was exchanged for what is now assumed to be the current legal doctrine – the restrictive theory of sovereign immunity.²⁶² A state's conduct falls

²⁵⁸ The ratification status is available at <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=074&CM=0&DF=&CL=ENG>; status as of 21 Oct. 2010.

²⁵⁹ The Convention was adopted by GA Res 59/38, 2 Dec. 2004. Even though 28 states have signed the treaty, only 6 have ratified it so far: see <http://treaties.un.org/cz/Pages/ViewDetails.aspx?src=TREATY&id=284&chapter=3&lang=en>.

²⁶⁰ Foreign Sovereign Immunities Act, 28 USC §§ 1330, 1602–1611.

²⁶¹ UK, State Immunity Act 1978, 17 ILM (1978) 1123; Canada, State Immunity Act 1982, 21 ILM (1982) 798; Australia, Foreign States Immunity Act 1985, 25 ILM (1986) 715; South Africa, Foreign States Immunity Act, reprinted in E.K. Bankas, *The State Immunity Controversy in International Law* (2005), at 455 ff.

²⁶² For the development of sovereign immunity see R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal and International Human Rights Law* (2008), at 12–64; Bankas, *supra* note 18, at 13–32; Fox, *supra* note 11, at 204–236.

within two categories: acts *iure imperii* or acts *iure gestonis*. It is either official or private. States therefore enjoy immunity as long as they act in their official capacity, but must submit to the jurisdiction of another state if they act as a private person.²⁶³

Even though this summary accurately describes the overall development of sovereign immunity, it also (over)simplifies it significantly. The change from absolute to relative immunity did not happen in the course of a few years. Quite the contrary. Belgian courts were the first to adopt the private acts exception as early as 1857,²⁶⁴ and Italian courts followed in the 1880s.²⁶⁵ In 1933 E.W. Allen concluded that a 'growing number of courts are restricting the immunity to instances in which the state has acted in its official capacity as a sovereign political entity. The current idea that this distribution is peculiar to Belgium and Italy must be enlarged to include Switzerland, Egypt, Rumania, France, Austria and Greece.'²⁶⁶

But it took an additional 20 years until Jack B. Tate, the then acting Legal Adviser to the Department of State, announced that the Department would no longer support absolute immunity for foreign states within the US, but adopt the private–public distinction instead.²⁶⁷ From 1857 to 1952 the scope and limits of sovereign immunity changed gradually and slowly. If immunity had actually been a specific state right, Belgium and other states would have continuously violated international law until a new rule evolved according to which states must face the charges within the territory of another states if their conduct is qualified as private. However, the absence of formal protests by states which had not yet accepted this new trend is quite remarkable – so remarkable that it led

²⁶³ L. Fisler Damrosch *et al.*, *International Law* (4th edn, 2004), at 1198.

²⁶⁴ Van Alebeek, *supra* note 19, at 14 with further references.

²⁶⁵ Fox, *supra* note 11, at 224; Appelbaum, *supra* note 11, at 47; each with further references.

²⁶⁶ E.W. Allen, *The Position of Foreign States Before National Courts* (1933), at 301.

²⁶⁷ Tate Letter, 19 May 1952, 24 Department of State Bull. 984 (1952), reprinted in *Alfred Dunhill of London Inc. v. Cuba*, 425 US 682, at 711–715 (1976).

Lauterpacht in 1951 to conclude that state practice is too diverse to assume that it has legally binding force under international law.²⁶⁸

The world of sovereign immunity has changed since 1951, at least with respect to the general acceptance of the restrictive theory.²⁶⁹ As a theory, it found widespread support among states,²⁷⁰ but the distinction between private and public acts is applied so divergently that it is hard to concede more than a very abstract conformity in state practice. Disagreement starts with the appropriate test for determining the act's character as private or public: is it the purpose or the nature?²⁷¹ Even though one can observe a tendency towards the nature test, Article 2(2) UNCJIS clearly reflects the still existing uncertainties. The private character of state action is usually determined by its nature, but its purpose becomes relevant if states agree so or if the forum state routinely applies the purpose rather than the nature test.

Despite this rather minor divergence, more fundamental differences exist, in particular concerning the context in which the private–public distinction applies. Historically, the restrictive theory is linked to the phenomenon of states entering the marketplace and taking part in commercial activities like private persons. It developed round the idea that ‘once the sovereign has descended from his throne and entered the marketplace he has divested himself of his sovereign status and is therefore no longer immune to the domestic jurisdiction of the courts of other countries’.²⁷² Both the ECSI and the UNCJIS follow this

²⁶⁸ H. Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’, 28 *BYBIL* (1951) 220, at 227–228.

²⁶⁹ Even Brownlie concedes by now that ‘there is a trend in the practice of states towards the restrictive doctrine of immunity. . .’: I. Brownlie, *Principles of Public International Law* (7th edn, 2008), at 325.

²⁷⁰ See Bankas, *supra* note 18, at 31; Fox, *supra* note 11, at 235; Van Alebeek, *supra* note 19, at 47.

²⁷¹ The FSIA, e.g., expressively refers to the nature of the acts: 28 US §1603(d). But, as Caplan, ‘State Immunity, Human Rights, and Ius Cogens: A Critique of the Normative Hierarchy Theory’, 97 *AJIL* (2003) 741, at 761 has pointed out, this approach is not universally applied; see also Bankas, *supra* note 18, at 215 ff.

²⁷² *Iº Congreso Del Partido*, House of Lords, 16 July 1981, 64 (1983) ILR 154, at 178, para. 527, thereby referring to the legal opinion of the plaintiff, not its own.

understanding, and the FSIA does so as well.²⁷³ It is not state behaviour in general which is either public or private, but only a state's participation in the marketplace. Therefore, the exception is more precisely described as the commercial exception. But this reduction of the private–public distinction has been challenged by courts. The House of Lords argued that 'it is possible to conceive of circumstances in which a sovereign may equally be regarded as having divested himself of his sovereign status, and yet not have entered the market place; the principle [the restrictive theory], if it applies at all, should apply to all circumstances, commercial or otherwise, in which a sovereign acts as any private citizen may act.'²⁷⁴

The differences between these two methods if, for example, applied to the problem of immunity for massive human rights violations could be fundamental. Neither torture, as in the case of *Al-Adsani*, nor the destruction of homes, property, and the mass killings of civilians in armed conflict, as in the *Distomo* case, are commercial in nature. The same holds true for slave labour, as in *Ferrini*. Even though its ultimate purpose could be described as commercial, the nature of detaining civilians and deporting them for the purpose of exploiting their work is not. The conduct of military forces within armed conflicts is therefore usually considered to be acts *iure imperii*.²⁷⁵ However, if we apply the standard suggested by the House of Lords and the Italian *Corte di Cassazione*, it is not unreasonable to reach a different result depending on how much emphasis is put, not on the legal context in which the act has taken place, but on the act itself.

²⁷³ Art. 3 (contractual obligation) and Art. 7 ECSI (commercial activities within the forum state); Art. 10 UNCJIS (commercial transactions), § 1605(a)(2) FSIA (commercial activities either within or with direct effect on the United States). The US Supreme Court has given the commercial activity exception a rather restrictive interpretation: see, e.g., *Saudi Arabia v. Nelson*, 507 US 349, 113 SCt 1471 (1993), granting sovereign immunity to Saudi Arabia which hired Mr Nelson in the US to work as an engineer in Saudi Arabia. Mr Nelson was tortured and detained unlawfully after he had repeatedly reported on-the-job hazards.

²⁷⁴ *I° Congresso*, *supra* note 29, at para. 527; see also the decision of the Corte di Cassazione in *Ditta Campione v. Ditta Peti Nitrogenmuvek*, Stato Ungherese, N. 3386, 14 Nov. 1972, to which the House of Lords explicitly refers.

²⁷⁵ *Ferrini*, *supra* note 7, at 664; see also *Distomo*, Bundesgerichtshof, *supra* note 8, at 559 ff.

The standard for determining the scope of immunity is whether ‘the sovereign acts as any private citizen may act’²⁷⁶ and whether the act requires governmental or sovereign authority.²⁷⁷ It is, of course, possible and in accordance with the current practice to argue that private persons, even though they can carry and use weapons, enjoy not the same legal or sovereign authority as members of the armed forces do. But such reasoning focuses on the circumstances in which acts of mass killings of civilians and torture have been committed (armed conflict) and not so much on the act itself. There is nothing official about killing or torturing a person, and these physical acts do not require any sovereign or governmental authority.²⁷⁸ Private entities and their personnel take part in armed conflicts as well, and they behave in the same way as official or a state’s military forces. It is therefore at least theoretically possible completely to neglect the official circumstances in which the acts take place and to focus exclusively on their very nature.

The analysis so far has revealed two important points. First, the transition from the absolute to the restrictive theory of sovereign immunity occurred gradually over a long period of time. During that period, states that still granted absolute immunity to foreign states failed to protest this development.²⁷⁹ Secondly, even now that the restrictive theory enjoys widespread support, it is understood differently by various national courts and legislation.²⁸⁰ Not only do different standards exist on how to determine the private or public nature of an act, the

²⁷⁶ *I° Congreso*, *supra* note 29, at para. 527.

²⁷⁷ Orakhelashvili, ‘State Immunity and International Public Order’, 45 *German Yrbk Int’l L* (2002) 226, at 235.

²⁷⁸ Even though the UN Convention Against Torture limits the definition of torture in Art. 1(1) to instances when ‘pain or suffering is inflicted by . . . a public official or other person acting in an official capacity’, this limitation does not alter the conclusion that the physical acts themselves can be performed by private persons as well, regardless of whether these acts are considered to be torture from a legal point of view. In addition, the Convention against Torture itself clearly states that the definition ‘is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application’.

²⁷⁹ Lauterpacht, *supra* note 25, at 228.

²⁸⁰ See H. Fox, *The Laws of State Immunity* (2002), at 292: ‘[t]he restrictive doctrine . . . ha[s] not produced uniformity in practice nor reliable guidance as to when a national court will assume or refuse jurisdiction. . . . [R]eference neither to the nature nor to the purpose of the activity can disguise the arbitrary choices made by courts.’

context in which this distinction should be applied is also uncertain. Is it limited to commercial activities and transactions or does it affect state behaviour in general? State practice so far has been anything but uniform, and it is not surprising that 'a closer examination of the details . . . demonstrates . . . that consensus exist only at a rather high level of abstraction'.²⁸¹ It is of course true that most states agree on the private–public distinction. But when it comes to determining the legal effects of sovereign immunity, the relevance of uniformity on an abstract level should not be overestimated. It is the question how this concept is actually applied and defined in practice which is crucial for legal analysis.

4.4 Tort Exception

In addition to the private–public distinction, the so-called tort exception has also played an important role in the rule–exception concept, especially in order to establish the jurisdiction of the forum state in cases of massive human rights violations.²⁸² It is obviously irrelevant in cases like *Al-Adsani*, in which the tortious act has been committed abroad and not within the forum state. But it could permit jurisdiction if personal injuries have been caused by an act or omission of the foreign state within the forum state, such as most atrocities committed by the German troops during World War II in the territories under their occupation. It is therefore not surprising that the Greek *Areios Pagos* argued in the *Distomo* case that this exception has evolved into a rule of customary international law and that it not only allows, but actually requires, that states reject the immunity claim of the foreign state.²⁸³

Still, the disputed status of this exception is evidenced by the ruling of the Greek *Anotato Eidiko Diskastirio* (Special Supreme Court) in the *Margellos* case. It

²⁸¹ Dellapenna, *supra* note 13, at 61.

²⁸² In general see C.H. Schreuer, *State Immunity: Some Recent Developments* (1998), at 93; Fox, *supra* note 11, at 569 ff; B. Hess, *Staatenimmunität bei Distanzdelikten* (1992), at 89 ff (US practice), at 138 ff (UK practice), and at 142 ff (Australian practice).

²⁸³ *Distomo*, *Areios Pagos*, *supra* note 8, at 519.

reached the opposite conclusion, arguing that when the injury is caused during an armed conflict, customary international law does not provide for an exception to the default rule of sovereign immunity.²⁸⁴ The *Corte di Cassazione* in *Ferrini*, on the other hand, agreed with the *Areios Pagos*. Even though the Court heavily emphasized the *jus cogens* character of the norms which Germany has violated, it also referred to the tort exception to support its ruling.²⁸⁵ The scholarly discussion which has ensued from these rulings has therefore concentrated on the question whether or not the tort exception is actually supported by international law.²⁸⁶

In particular states that enacted national legislation on sovereign immunity included exemptions for torts committed in the forum state.²⁸⁷ The ECSI (Article 11) and the UNCJIS (Article 12) contain a similar exception for tortious acts that occurred on the territory of the forum state, with one major difference: the ECSI also incorporates an express counter-exception for ‘anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State’: Article 31. Consequently, the tort exception would not apply to

²⁸⁴ *Margellos*, Anotato Eidiko Diskastirio, *supra* note 8, at 526. The ruling in *Margellos* must be distinguished from the judgment of the ECHR in *McElhinney*, *supra* note 5. The Court only held that Ireland, by granting immunity for torts committed by *acta jure imperii*, acted within the currently accepted international standards: *McElhinney*, at para. 38. It did not decide whether states are under an obligation to grant immunity in such cases. The judgment is therefore better understood in the following way: a state may grant or deny immunity, but it is under no obligation to do either; a similar view is held by Cremer, ‘Entschädigungsklagen wegen schwerer Menschenrechtsverletzungen und Staatenimmunität vor nationaler Zivilgerichtsbarkeit’, 41 *Archiv des Völkerrechts* (2003) 137, at 154. It is therefore misleading to refer to the judgment as proof that states are prohibited from denying immunity in cases in which personal injuries are caused by a foreign state on the territory of the forum state, even if it involves an act or omission by the armed forces of that state (for such an interpretation see Dörr, *supra* note 8, at 209).

²⁸⁵ *Ferrini*, *supra* note 7, at 670 ff, and at 674 (sects 10 and 12 of the judgment respectively); see also Gattini, *supra* note 7, at 230 ff and De Sena and De Vittor, *supra* note 7, at 97 who, in light of the *ius cogens* argument, consider it of minor relevance that the *Corte di Cassazione* relied on the fact that the acts had been committed in Italy. This might actually explain why the Court did not bother to rule on the legal nature of the tort exception and its status under customary international law.

²⁸⁶ See accompanying text at *supra* notes 7 and 11; see also Handl, ‘Staatenimmunität und Kriegsfolgen am Beispiel des Falles Distomo: Anmerkungen zur Entscheidung des Obersten Gerichtshofs Griechenlands (*Areopag*) vom 4. Mai 2000’, 61 *Zeitschrift für öffentliches Recht* (2006) 433, demanding a more thorough argument because the tort exception limits existing rights.

²⁸⁷ For the US see 28 USC 1605(a)(5); for the UK sect. 5 of the State Immunity Act 1978; for Canada sect. 6 State Immunity Act 1982; and for Australia sect. 13 Foreign States Immunity Act 1985.

situations like those in *Ferrini* and *Distomo*.²⁸⁸ The UK drafted its State Immunity Act in a similar fashion: including a tort exception in section 5, but explicitly excluding anything relating to acts or omissions of armed forces in section 16(2), whereas the FSIA and the UNCJIS do not contain any explicit privileges for acts of the armed forces.

Still, it has been argued that the UN Convention must be understood in this way because the 1991 commentary on Article 12 clarified that only insurable risks should be covered by the tort exception.²⁸⁹ But the authority of an ILC commentary is debatable. According to Article 31 Vienna Convention on the Law of Treaties (VCLT),²⁹⁰ a treaty must be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. To define the purpose of Article 12 by referring to the ILC commentary would eventually neglect the fact that according to Article 32 VCLT, the preparatory work is regarded as supplementary means of interpretation. It may be invoked only if the interpretation of a provision according to Article 31 leaves its meaning obscure, ambiguous, or leads to a result which is manifestly absurd or unreasonable.²⁹¹ It is hardly a manifestly absurd and unreasonable result to include personal injuries caused by the armed forces of another state on the territory of the forum state if this actually reflects the current

²⁸⁸ Apart from the fact that the Convention does not apply to acts, omissions, or facts which took place prior to the date on which the Convention was opened for signature on 16 May 1972: Art. 35(3).

²⁸⁹ [1991] Yrbk Int'l L Comm II/2, at 45. In addition G. Haffner as Chairman of the Ad Hoc Committee stated that it was the general understanding of the Committee that military activities were not covered by the Convention: see summary record of the 13th meeting of the Sixth Committee, UN Doc C.6/59/SR.13, 25 Oct. 2004.

²⁹⁰ Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155 331, 8 ILM (1969) 679.

²⁹¹ If the commentary can be qualified as an instrument within the meaning of Art. 31(2) VCLT, it would in fact have significant authority for the interpretation of the Convention as it is part of the context in which the treaty was concluded. But the commentary has not been made by one or more parties as it is the commentary of the ILC. In addition, UN GA Res 59/38 of 2 Dec. 2004 which adopted the Convention only recalls the work of the ILC, its draft articles and commentaries in its preamble without embracing its content. The exact scope of Art. 12 UNCJIS is therefore unclear. It is not unreasonable to interpret it in such a way as to include torts committed by the armed forces of another state within the forum state, which would also include situations of armed conflict: see Fox, *supra* note 11, at 582.

practice of at least some states. The tort exception of the FSIA, for example, has been applied to activities of foreign intelligence within the US.²⁹²

Thus, the current state practice may not support a rule of customary international law according to which states must deny sovereign immunity in case of tortious acts committed by another country in the forum state.²⁹³ Even though such an obligation is included in the ECSI and the UNCJIS, a considerable number of states do not apply this exception. But this does not answer the question whether states are prohibited from doing so. Section 1605 of the FSIA, for example, denies immunity in cases ‘in which money damages are sought . . . for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state’.²⁹⁴ If sovereign immunity is the default rule and all exceptions must reflect customary international law, and if the tort exception has not yet evolved into custom, then states such as the US, UK, Canada, and Australia that have included the tort exception in their national immunity laws automatically violate international law – a conclusion which no commentator so far has suggested. But if states that enact this exception as law do not violate international law, why then should a state do so if its courts apply this exception not on the basis of national law, but on the basis of how they construe and interpret the doctrine of sovereign immunity under international law?

²⁹² *Letelier v. Republic of Chile*, 488 F. Supp 665 (DDC 1980); *Liu v. Republic of China*, 892 F. 2d 1419 (9th Cir. 1989). It could be argued that foreign intelligence is different from actions by the armed forces. But such understanding would enable the foreign state to circumvent restrictions to immunity by separating intelligence from the armed forces. It would thus be the foreign state and not the forum state which determined the scope of immunity.

²⁹³ Cremer, *supra* note 41, at 150; Fox, *supra* note 11, at 587 arguing that Art. 12 UNCJIS ‘is a considerable advance on existing law’, thereby implying that it has not evolved into a rule of customary international law; Dörr, *supra* note 11, at 208 ff.

²⁹⁴ § 1605(5) FSIA; however, the exception, even though including acts of ‘any official or employee of that foreign state while acting within the scope of his office or employment’, does not apply to a ‘claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused’.

4.5 (Implied) Waivers

The very foundation of sovereign immunity – the sovereignty of the foreign state – obviously allows a state to waive its immunity and reveals at the same time that immunity must be understood as a rule–exception relationship: states are entitled to claim immunity as long as none of the exceptions apply or as long as the state has not consented to the jurisdiction of another country.²⁹⁵ It has therefore been suggested that consenting to the jurisdiction of another state and consenting to the jurisdiction of an international court are just two sides of the same coin.²⁹⁶ The consent can either be issued by an express statement or derived from the behaviour of the state, especially from arguing on the merits of the case. It has therefore been advocated that the concept of implied waiver should be applied to fundamental human rights violations as well.²⁹⁷ But expanding it could be seen as a blunt attempt to reach the correct result and has therefore found only little support in theory and in practice.²⁹⁸

Supporters of that argument could, however, point to the commercial exception, its development, and the change that the rise of human rights brought about in the international system. A sovereign doing business like a private person has disposed of her sovereign rights: ‘once the sovereign has descended from his throne and entered the marketplace he has divested himself of his sovereign

²⁹⁵ § 1605(a)(1) FSIA, Arts 2 and 3 ECSI, Arts 7 and 8 UNCJIS.

²⁹⁶ Brownlie, ‘Contemporary Problems Concerning the Immunity of Foreign States’, 62 *Annuaire Institut de Droit International* (1987) 6, at 55; Jennings, ‘The Place of Jurisdictional Immunity of States in International and Municipal Law’, Lecture at the European Institute at the University of the Saarland (1988). Even though the parallel between immunity and the international dispute settlement rule is convincing at first glance, it must be restricted to cases in which one state sues another state in yet another state: see Hess, *supra* note 39, at 324 ff with further reference; see also Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’, 54 *British Yrbk Int’l L* (1983) 74, at 80.

²⁹⁷ See Belsky, Merva, and Roht-Arriaza, ‘Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law’, 77 *California L Rev* (1989) 365.

²⁹⁸ Among them is the Court of Leivadia, the Greek Court of First Instance, which issued the first judgment in the course of the still ongoing Distomo litigation in 1997: see *Distomo*, Court of Leivadia, *supra* note 7, at 599.

status and is therefore no longer immune'.²⁹⁹ The commercial exception is obviously based on a capitalist conception of the liberal state, its inherent distinction between private and public, and on the idea that economic transactions are private and not public. If someone is participating in economic activities in a capitalist society she is doing so in her private capacity, an assumption which applies to the sovereign too. Thus, by stepping down from the throne and entering the territory of another state, the sovereign implicitly waives her sovereignty.³⁰⁰ With the aggrandizement of human rights, our understanding of the state and its powers *vis-à-vis* its citizens changed again. The once sacrosanct sovereign authority was first restricted by capitalism and now by human rights. Thus, the implied waiver for fundamental human rights only transfers the idea on which the commercial exception is based to the new realities of international law and the changed conception of the state and its powers.

Even though such reasoning would put the implied waiver idea for fundamental human rights violations on a theoretically firmer footing, it misreads the rationale for the commercial exception. It does not rest on the limits of sovereignty in relation to private persons. The sovereign was still allowed to take part in commercial transactions, but had to accept that she must subscribe to the rules of the marketplace as an equal. The sovereign did not waive her immunity; she simply had none – like any other private person. Accordingly, other states would view a state that participates in the marketplace not as a state, but as a private person. Exercising jurisdiction could therefore not affect the other state's

²⁹⁹ *I° Congreso*, *supra* note 29, at 178, para. 527.

³⁰⁰ Such reasoning is actually based on two different aspects. The first has a specific international context: a state enters the territory of another state and by doing so it consents to the jurisdiction of that state: see *Storelli v. Governo della Repubblica Francese*, Court of Rome, 26 *AJIL* (1932) Supp 604, at 605 stating that the territorial jurisdiction of the forum state does not automatically yield to the claim of sovereign immunity of the foreign state, especially when much more emphasis is put on the jurisdiction of the forum state, as is the case in common law countries: see Fox, *supra* note 11, at 58. This may also explain the tendency of common law lawyers to define jurisdiction of the forum state as the default rule and immunity as an exception to it: see Caplan, *supra* note 28, at 744. The second aspect of the implied waiver argument is of a more general nature: it is the participation in the marketplace which is interpreted as an implied waiver of immunity. This reasoning is limited to commercial activities, whereas the implied waiver based on entering another state's territory would apply to official acts as well, at least theoretically.

sovereignty. Those who argue for an implied waiver equate sovereignty (and its limits *vis-à-vis* the individual) with sovereign immunity – a conclusion that does not reflect the basis of immunity in international law. It is the relationship between two sovereigns and not the relationship between a sovereign and the individual within her power on which sovereign immunity rests.³⁰¹ The implied waiver theory therefore assumes a paradigm shift in international law which has not yet taken place, at least with regard to the enforcement of human rights.³⁰² States, and not the individual, are still the foundation of the international system. But the inconsistency between the protection of fundamental human rights, such as the prohibition of torture, war crimes, and crimes against humanity on the one hand, and granting immunity to those who are responsible or at least liable for these acts on the other hand lies at the centre of what is best described as the supremacy argument.³⁰³

4.6 *Jus Cogens*, Human Rights Violations, and Sovereign Immunity

In practice, the idea that sovereign immunity must yield to fundamental human rights violations was first applied by the US District Court in the *Princz* case.³⁰⁴

³⁰¹ The basis of sovereign immunity in international law is hotly debated. Generally courts and scholars refer to the sovereign equality and independence and the principle of *par in parem non habet imperium*, meaning that an equal does not have power over an equal: see, e.g., Bankas, *supra* note 18, at 37 ff; van Alebeek, *supra* note 19, at 47 ff; Fox, *supra* note 11, at 40 ff; J. Bröhmer, *State Immunity and the Violation of Human Rights* (1997), at 11 ff. But the equality aspect, and therefore the principle of *par in parem non habet*, is seriously questioned because equality has been given a mere formal meaning, not a substantial one: see Hess, *supra* note 39, at 307, with further references. The League of Nations also referred solely to the state's independence and did not mention the sovereign equality of states as a basis for immunity: Publications of the League of Nations, V: Legal. 1927. V.9 No. 11, Competence of the Courts in regard to Foreign States, reprinted in 22 *AJIL* (1928), Sp. Supp. 117, at 118. In addition one must keep in mind that the principle of *par in parem non habet* was developed at a time when sovereignty was usually based not on equality, but on the personal dignity of the sovereign, and later the abstract dignity of the state. The equality argument is therefore closely connected to the dignity of states – a basis we should reject in modern international law.

³⁰² For a more detailed discussion on the obligations of states with regard to 'private enforcement' of human rights see *infra*, the text accompanying notes 76–82.

³⁰³ Bröhmer *supra* note 58, at 189 ff; Bianchi, 'Denying State Immunity to Violations of Human Rights', 46 *Austrian J Public & Int'l L* (1994) 195, at 220 ff, stressing not the formal hierarchy of norms, but what he calls a 'jurisprudential approach' based on coherence in interpreting international law; this view is also supported by De Sena and De Vittor, *supra* note 7, at 102 ff, who argue that the Corte di Cassazione in *Ferrini* has in fact taken this position.

³⁰⁴ *Princz v. Federal Republic of Germany*, 813 F. Supp 22 (DDC 1992).

However, the heyday of the supremacy argument was short: the US Court of Appeals for the DC Circuit overruled the judgment.³⁰⁵ And even though the judgment of the House of Lords in the *Pinochet* case seems to rest on it,³⁰⁶ and although it reappeared prominently in the powerful dissenting judgment in the *Al-Adsani* case,³⁰⁷ it was not until the *Corte di Cassazione* delivered its judgment in *Ferrini* that a state's highest court had ever embraced it explicitly:

Such [fundamental human] rights are protected by norms, from which no derogation is permitted, which lie at the heart of the international order and prevail over all conventional and customary norms, including those, which relate to State immunity... The recognition of immunity from jurisdiction... for such misdeeds stand in stark contrast to [this] . . . analysis, in that such recognition does not assist, but rather impedes, the protection of those norms and principles. . . There is no doubt that a contradiction between two equally binding legal norms ought to be resolved by giving precedence of the norm with the highest status.³⁰⁸

But no matter how plausible this reasoning may appear, it rather simplifies the concept of *jus cogens* and its consequences on 'ordinary' international law. Most scholars would probably agree by now that *jus cogens* is a valid category of norms in international law, yet everything else is disputed – such as how to

³⁰⁵ *Prinz v. Federal Republic of Germany*, 26 F. 3d 1166 (DC Cir. 1994); for a review see Reisman, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Prinz v. Federal Republic of Germany*', 16 *Michigan J Int'l L* (1994–95) 403, and Zimmermann, 'Sovereign Immunity and Violation of *Ius Cogens* – Some Critical Remarks', 16 *Michigan J Int'l L* (1994–95) 433.

³⁰⁶ *Pinochet*, *supra* note 1, at 581. Accepting that the prohibition of torture formed part of *ius cogens* plays an important role in the judgment. But interestingly it is primarily invoked to establish universal jurisdiction for international crimes. However, establishing and exercising jurisdiction in such cases necessarily implies that the accused cannot rely on sovereign immunity: see Lord Phillips at 661. At the same time Lord Hutton at 640 and Lord Millet at 651 explicitly expressed their conviction that denying immunity for criminal liability of the individual does not imply that the state itself is deprived of its immunity before courts in another state.

³⁰⁷ *Al-Adsani*, *supra* note 4, Joint Dissenting Opinion of Judges Rozakis and Cafilisch, Joined by Judges Wildhaber, Costa, Cabral Baretto, and Vajić, at para. 4; Dissenting Opinion of Judge Ferrari Bravo and Dissenting Opinion of Judge Loucaides who agrees with Judges Rozakis and Cafilisch in general, but prefers a balancing approach for each case in order to determine whether granting immunity would violate the individual's right of access to court under Art. 6(1) ECHR.

³⁰⁸ *Ferrini*, *supra* note 7, at 668–669.

determine which norms have acquired the status of *jus cogens* and which practical consequences this generates.³⁰⁹

One of the many particularities of the whole discussion is a basic assumption which has not been seriously questioned: fundamental human rights, like the prohibition of torture, crimes against humanity, and war crimes, are part of *jus cogens* whereas sovereign immunity, even though a legally binding rule, belongs to the bulk of norms that form the body of 'ordinary' international law.³¹⁰ This view reveals a substantive understanding of *jus cogens* which focuses on the basic values of the international community.³¹¹ In contrast to a more formal perception, it emphasizes the protection of the most fundamental human rights, thereby strengthening the position of the individual *vis-à-vis* the state.³¹² Such a normative understanding of *jus cogens* is, of course, not uncontested. The more formal or systematic perception includes rules that are inherent to the functioning of the international legal system, like *pacta sunt servanda*, good faith, and the sovereign equality and independence of states.³¹³ If we accept, first, this more state-centred concept of *jus cogens* and, secondly, that sovereign immunity is directly based on sovereignty and the independence of states, it is much more difficult to argue that sovereign immunity – at least in its core element – is not part of *jus cogens*. Thus, construing a conflict between a *jus cogens* norm and an 'ordinary' norm of international law in the case of fundamental human rights violations and state immunity already points to a conception of international law that is highly relevant for solving this (alleged) conflict: the supremacy of human

³⁰⁹ See in general L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988); A. Orakhelashvili, *Peremptory Norms in International Law* (2006).

³¹⁰ See *Al-Adsani*, *supra* note 4, Dissenting Opinion of Judges Rozakis and Caflisch, at para. 2.

³¹¹ C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), at 141; see also Orakhelashvili, *supra* note 34, at 255 defining *ius cogens* as peremptory norms of general international law which 'serve as a public order embodying material constitutional provisions of international law'.

³¹² Tams, *supra* note 68, at 142 with further references, especially to the commentary on Art. 40 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, [2001] Yrbk Int'l Law Commission II, Pt Two.

³¹³ Abi-Saab, 'The Use of Article 19', 10 *EJIL* (1999) 339, at 349 referring to systemic norms of a legal system imposed by logical or legal necessity. On systemic norms see also A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd edn, 1984), at 59–60.

rights. But given the current state of international law, it is far from settled that such an absolute hierarchy exists. Assuming a conflict is therefore not the only way in which the relationship between violations of fundamental human rights and the granting of sovereign immunity can be illustrated.

This conclusion is closely linked to another problem that those who promote the supremacy argument have not been able to solve convincingly: does a conflict of norms exist which must be resolved in favour of human rights?³¹⁴ Surely, Articles 53 and 64 of the VCLT prescribe that a treaty is either void at the time of its conclusion if it is inconsistent with an existing peremptory norm of general international law or becomes void if such a norm evolves after the treaty's entering into force.³¹⁵ But it is far from being settled that this specific consequence applies outside conflicting treaty obligations involving *jus cogens*. Assuming a conflict between fundamental human rights and state sovereignty in customary international law, it is not a matter of logic that the latter must yield to the former, but rather a matter of discussion.³¹⁶

In addition, the clash between fundamental human rights and sovereign immunity is a clash of concepts and ideologies, not of norms. A conflict of norms would actually require that the legal consequences of two norms are incompatible with each other – a requirement not met in the case of fundamental human rights and sovereign immunity. It is one of the truisms of international law that the existence

³¹⁴ See, e.g., Orakhelashvili, *supra* note 34, at 255, arguing that peremptory norms, since they embody the community interest, must operate unimpeded in case of a conflict, thereby presupposing the existence of a conflict without describing it. The *Corte di Cassazione* in *Ferrini* assumed the existence of a conflict as well. But it seems to understand it not as a conflict of norms or rules, but as a conflict of values because it stresses the importance of *ius cogens* for the reinterpretation of sovereign immunity: *Ferrini*, *supra* note 7, at 670. The effect is, of course, quite similar, but the reasoning much more convincing. Still, the analysis of the *Corte di Cassazione* requires that 'sovereign immunity as a norm of customary international law' is actually flexible enough to be reinterpreted. This, in return, suggests that the court, despite its unclear terminology, conceives immunity as a principle and not as a rule.

³¹⁵ For the relevance of *ius cogens* on the law of treaties see in general C.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976); Czaplinski, 'Ius Cogens and the Law of Treaties in The Fundamental Rules of the International Legal Order' in C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (2006), at 83–98.

³¹⁶ Tams, 'Schwierigkeiten mit dem Ius Cogens, Anmerkungen zum Urteil des Europäischen Gerichtshofs für Menschenrechte im Fall Al-Adsani gegen Vereinigtes Königreich vom 21. November 2001', 40 *Archiv des Völkerrechts* (2002) 331, at 345.

of a rule and its enforcement are two different sets of problems.³¹⁷ The absence of a centralized enforcement system is one of the characteristics and may be the weakness of the international legal system. It is therefore not only legitimate but also perfectly consistent with international law to argue that the existence of a norm is completely unrelated to its enforcement.³¹⁸ This is true not only for 'ordinary' international law, whether treaty or custom, but also for peremptory norms. To conclude from the *jus cogens* character of a norm that all other norms which may limit its enforcement are invalid would require the existence of the following rule: any *jus cogens* norm, because of its superior value, invalidates rules which limit its enforcement. Such a rule does not and will not exist.

It is, of course, not impossible to construe a conflict of norms, and not just a clash of concepts. Such a conflict of norms would occur if states were not only allowed, but actually required, to grant unrestricted access to their courts and establish universal jurisdiction in civil matters for all cases of fundamental human rights violations. But for the time being, international law is far from reaching this state.

Article 14 of the Anti-Torture Convention could be interpreted as a first step in this direction, because it requires member states to ensure an enforceable right to fair and adequate compensation for torture victims. But the meaning of Article 14 and thereby the scope of the obligation is unclear. The Committee against Torture seems to believe that Article 14 actually obliges states to establish universal jurisdiction and to deny sovereign immunity to foreign states because it criticized Canada for the 'absence of effective measures to provide civil compensation to victims of torture *in all cases*' and suggested that Canada 'should... ensure the provision of compensation through its civil jurisdiction *to all victims* of torture'.³¹⁹ The committee was probably responding to the ruling of the

³¹⁷ Zimmermann, *supra* note 62, at 438.

³¹⁸ *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*, 1933 PCIJ (ser A/B) No. 61, 1933: 'It is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself.'

³¹⁹ Conclusions and recommendations of the Committee against Torture: Canada, 7 July 2005, CAT/C/CR/34/CAN (emphasis added).

Ontario Court of Appeal in *Bouzari v. Iran*.³²⁰ In this case, the court held that the federal State Immunity Act barred Mr Bouzari from bringing a civil action in Ontario for torture inflicted upon him by, and in, Iran at a time when he was still an Iranian citizen.³²¹ The United States, on the other hand, when ratifying the Convention has taken the view that Article 14 was intended to have territorial limitations.

The negotiating history of the Convention indicates that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in its territory, not for acts of torture occurring abroad. Article 14 was in fact adopted with express reference to “the victim of an act of torture committed in any territory under its jurisdiction.” The italicized wording appears to have been deleted by mistake.³²²

It is not unreasonable to assume that a state is only required to ensure civil remedies for acts which have been committed within its territories and/or by its officials, and that that state is not obliged to establish civil universal jurisdiction and deny foreign sovereign immunity in cases of torture.³²³ But even if states are under a treaty obligation to provide a civil remedy in all cases of torture, this obligation must also qualify as a *jus cogens* obligation in order to prevail over immunity under customary international law.³²⁴ To prove only the *jus cogens* character of the fundamental human right does not suffice. Thus even those who

³²⁰ *Bouzari v. Republic of Iran* (2004), 71 OR (3d) 675, (2004) 243 DLR (4th) 406 (CA); see also Forcese, ‘De-immunizing Torture: Reconciling Human Rights and State Immunity’, 52 *McGill LJ* (2007) 127, at 129 and 160–161 and Novogrodsky, ‘Immunity for Torture: Lessons from *Bouzari v. Iran*’, 18 *EJIL* (2008) 939.

³²¹ Mr Bouzari, after being tortured in Iran, was granted refugee status in Canada. He applied for Canadian citizenship, but his application was not granted until hearings during appeal: *supra* note 77, at para. 15.

³²² Reagan Administration Summary and Analysis of the Convention, reproduced in US Senate Committee on Foreign Relations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. No. 30 (1990), at 23–24.

³²³ M. Nowak and E. McArthur, *The United Nations Convention Against Torture – A Commentary* (2008), Art. 14, at para. 123: ‘[s]tates are not yet legally required by Article 14 (1) to ensure universal civil jurisdiction before their domestic courts’.

³²⁴ See Gattini, *supra* note 7, at 236: ‘[t]he incoherence could arise only to the extent that it is . . . assumed that the right of access to justice constitutes itself a *jus cogens* norm, which it is evidently not’.

argue in favour of a human rights exception to sovereign immunity must concede that there is 'not yet any consistent state practice or case law to the effect that the rule of State immunity must yield norms of *jus cogens*, in particular in the case of torture'.³²⁵

4.7 Sovereign Immunity and Comity

The diametrically opposite position to immunity as a specific state right is held by those who deny sovereign immunity any legal effect under customary international law.³²⁶ They refer either to inconsistent state practice, as highlighted by Lauterpacht,³²⁷ or to the territorial sovereignty of the forum state which prevails over any sovereignty claim that foreign states may have when they face legal action in the forum state, as the US Supreme Court does in its current jurisprudence.³²⁸ The latter view in particular is based on a controversial reinterpretation of one of the oldest judgments on sovereign immunity: that of 1812 in *Schooner Exchange v. Fadden* by the US Supreme Court.³²⁹ Scholarly writing and jurisprudence are obviously divided in their understanding of the case. It has been referred to as a source for the absolute theory of sovereign immunity³³⁰ as well as for the assumption that immunity is granted as a matter of courtesy and not as a matter of law.³³¹

³²⁵ A. Cassese, *International Law* (2nd edn, 2005), at 106–107.

³²⁶ For a summary see Fox, *supra* note 11, at 13 ff.

³²⁷ Lauterpacht, *supra* note, at 227–228. In addition to inconsistent state practice and the absence of protest by those states which were still relying on the absolute concept of sovereign immunity, Lauterpacht referred to the phenomenon of reciprocity in granting sovereign immunity – a peculiar precondition if a duty to grant sovereign immunity exists as a matter of international custom.

³²⁸ *Dole Food Co. v. Patrickson*, 538 US 468, 479 (2003); *Republic of Austria v. Altmann* 541 US 677, 696 (2004). See also Caplan, *supra* note 28, at 764, who seems to embrace the US position that comity is the correct basis of immunity in international law but at the same time stresses its binding legal effect as a rule of customary international law.

³²⁹ *The Schooner Exchange v. McFadden*, 11 US (7 Cranch) 116 (1812).

³³⁰ Bankas, *supra* note 18, at 21; Damrosch, *surpa* note 20, at 1197.

³³¹ Caplan, *supra* note 28, at 745 ff; whereas Appelbaum, *supra* note 11, at 37 concedes that it could be interpreted either way.

The factual observation made by Lauterpacht is undeniable: state practice with regard to sovereign immunity was inconsistent in 1951, and it still is in 2009. But what conclusion can be drawn from this? The answer depends very much on what can be established as the lowest common denominator among states. It is quite striking that all states accept foreign sovereign immunity as a category or concept of international law. Even the United States, when enacting the FSIA, believed that immunity reflected a doctrine of international law.³³² Foreign sovereign immunity as international custom is therefore characterized by agreement among states concerning the concept as such, and at the same time by substantial disagreement on detail and substance. It is, thus, binding on states, but only on a very high level of abstraction. Characterizing sovereign immunity not as a rule but as a (legally binding) principle of international law is the only way to reconcile these alleged inconsistencies.

4.8 Sovereign Immunity – A Principle

The current literature and jurisprudence often refer to sovereign immunity as a principle of international law. But, with a few exceptions, the term is obviously used as a synonym for a rule and not as a distinct category that requires a different analysis from the rule–exception concept.³³³ The idea of principles as an independent category of norms is not new. But so far it has not been linked to foreign sovereign immunity as an explanation for the current diverse state practice on the one hand and the wide-reaching consensus on the general concept on the other hand.

³³² ‘Sovereign Immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state’: HR Rep 94-1487, 1976 USCCAN 6604, at 6606, 15 ILM (1976) 1398, at 1402; see also Fox, *supra* note 11, at 14.

³³³ The *Corte di Cassazione* in *Ferrini* counts as one of the few exceptions. Although it considered sovereign immunity to be a norm under customary international law, it held at the same time that ‘no matter how often [the proposition that only an express normative provision would be able to justify derogation from the principle of sovereign immunity] is repeated, this proposition is one with which this Court cannot agree’: *Ferrini*, *supra* note 7, at 671. The Court can derive at this conclusion only on the assumption that immunity is a principle, not a rule. De Sena and De Vittor, *supra* note 7, at 89 seem to interpret the *Ferrini* decision in this way as well.

A Rules and Principles – What's the Difference?

The difference between rule and principle has been widely discussed in legal theory. In particular Ronald Dworkin emphasized not only their existence, but also their importance for our understanding of law.³³⁴

[P]rinciples . . . conflict and interact with one another, so that each principle that is relevant to a particular legal problem provides a reason arguing in favor of, but does not stipulate, a particular solution. The man who must decide the problem is therefore required to assess all the competing and conflicting principles that bear upon it, and to make a resolution of these principles rather than identifying one among others as 'valid'.³³⁵

Naturally, it is impossible to establish a clear-cut distinction between principles and rules. But problems in categorization can hardly affect the existence of the category itself. A classical criterion for separating principles from rules is the former's lack of precision. Rules are more specific than principles, and the degree of abstraction indicates the legal nature of the norm: it is either a rule or a principle.³³⁶

More important, however, than the level of generality are the different legal consequences of a collision of rules and principles. A rule has a specific legal consequence, meaning that it either requires or allows for a certain behaviour. Any deviance from this rule is thus prohibited, at least as long as the rule is valid – something that Dworkin has called the all-or-nothing fashion of rules.³³⁷ If two rules collide because the first rule requires what the second rule prohibits, only

³³⁴ R. Dworkin, *Taking Rights Seriously* (1977), at 22 ff and at 71 ff.

³³⁵ *Ibid.*, at 72

³³⁶ Raz, 'Legal Principles and the Limits of Law', 81 *Yale LJ* (1972) 823, at 838; Christie, 'The Model of Principles', 17 *Duke LJ* (1968) 449, at 669.

³³⁷ Dworkin, *supra* note 91 at 24: '[r]ules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision'.

one of the rules can be valid. The conflict can be solved by adding an exception to the first rule for all cases of the second rule or, if no exception exists, by recourse to more general maxims like *lex specialis* or *lex posterior*.³³⁸ A principle, however, allows for a broader spectrum of possible behaviour. It does not require a particular decision. Quite the contrary; a principle of a given legal system is something which 'officials must take into account, if it is relevant, as a consideration inclining in one direction or another'.³³⁹ Principles can therefore be fulfilled gradually depending on what is legally and factually possible.³⁴⁰ As with rules, more than one principle may apply to a specific situation, each leaning towards different outcomes. But even though one principle may be given more weight in a certain situation, this does not necessarily mean that it is no longer part of the legal system – as is the case with an invalid rule. Instead, it can prevail in other circumstances over other colliding principles. As a consequence, principles which collide must be balanced against each other with a view to the case at hand and the facts involved. The balancing process, in turn, will produce a specific rule that requires a certain behaviour in a certain situation.³⁴¹ In other words, the rule reflects the outcome of the balancing process of two different principles.

As long as one or more people are authorized to undertake this balancing process for a group of persons and as long as the result is binding on everyone within this group, we will not encounter any difficulties with regard to different outcomes. But if such an authority does not exist, the process of balancing conflicting principles and thereby specifying the rules which apply to a particular case or situation will inevitably result in different and sometimes even inconsistent results. But both outcomes may reflect a reasonable construction of one single principle or of a balancing of conflicting principles.

³³⁸ On the conflict of rules see R. Alexy, *Theorie der Grundrechte* (1986), at 77 ff.

³³⁹ Dworkin, *supra* note 91, at 25.

³⁴⁰ Alexy, *supra* note 95, at 75.

³⁴¹ *Ibid.*, at 81 ff.

B Principles in International Law

The idea of principles as an independent category is not unknown in international law. The ‘general principles of law recognized by civilized nations’ are, for example, listed among the sources of international law in Article 38(1)(c) of the ICJ Statute.³⁴² The provision was included to enable the Court to fill gaps which its drafters thought to be very common in international law.³⁴³ The wording suggests quite unambiguously that the provision applies only to principles which are derived from a comparative study of municipal legal systems.³⁴⁴ But an alternative interpretation understands Article 38(1)(c) to include general principles of international law as well, such as *pacta sunt servanda* and good faith.³⁴⁵ Yet, no matter how the general principle’s provision is understood, it serves only as a back-up in the event that treaty or custom does not provide the required solution and leaves the Court and parties to the dispute with a *non-liquet*.³⁴⁶ Thus, Article 38(1)(c) does not cover the entire dimension of principles in international law because they also exist within treaties and custom.³⁴⁷

³⁴² Statute of the International Court of Justice, 24 Oct. 1945, 59 Stat. 1055 (1945), TS No. 993.

³⁴³ Pellet, ‘Article 38’, in A. Zimmermann, C. Tomuschat, and K. Oehlrich-Frahm (eds), *The Statute of the International Court of Justice – A Commentary* (2006), at para. 245 with further references.

³⁴⁴ *Ibid.*, at para. 249, stating that there is little doubt that general principles within the meaning of Art. 38(1)(c) are ‘unwritten legal norms of wide-ranging character; and recognized in the municipal laws of States; moreover they must be transposable at the international level’.

³⁴⁵ For a summary see Thirlway, ‘The Source of International Law’, in M.D. Evans (ed.), *International Law* (2006), at 115, 128. According to M.N. Shaw, *International Law* (5th edn, 2003), at 95: ‘it is not clear . . . whether what is involved is a general principle of law appearing in municipal systems or a general principle of international law’. At the same time he considers *pacta sunt servanda* to be a ‘crucial general principle of international law’: *ibid.*, at 97. The PCIJ also referred to a principle of international law rather than general principles recognized by civilized nations: *Chorzów Factory Case*, PCIJ Series A, No 17, 1928, at 29.

³⁴⁶ Shaw, *supra* note 102, at 93; Thirlway, *supra* note 102, at 127.

³⁴⁷ It has been argued that principles belong to a category of norms beyond the classical sources of public international law as they are contained in Art. 38(1)(c) of the ICJ Statute. Particularly the element of *opinio iuris*, which is necessary to establish international custom requires a degree of specification which principles lack: see C.-S. Zöllner, *Das Transparenzprinzip im Internationalen Wirtschaftsrecht* (2009), at 95 ff. This reasoning is not necessarily convincing. If we accept that principles are in theory part of the law, then there is no reason why states cannot accept a principle as law and behave accordingly, thereby establishing a certain state practice. This practice will probably be inconsistent with regard to details seeing that states differ in how they specify or balance competing principles. But there is a general understanding on what the law is.

C Sovereign Immunity – a Principle, not a Rule

All states, with a very few exceptions, accept sovereign immunity as something which is legally binding under international law. But that's basically it.³⁴⁸ The extent to which foreign states are awarded immunity differs from state to state. Even the restrictive theory of sovereign immunity and its distinction between public and private acts is applied so divergently that it is more aptly described as an idea, doctrine, or concept which needs to be specified before it can be applied to a case than as a specific rule.³⁴⁹

But what is eventually more important for the categorization of immunity as a principle and not as a rule is the current diverse state practice concerning exceptions to sovereign immunity, in particular the tort exception and its scope of application. If sovereign immunity is a rule and the tort exception, at least with regard to acts *iure imperii*, has not yet acquired the status of customary international law, all states which apply it commit an international wrong.³⁵⁰ The same is true for states that expand the public–private distinction beyond its original commercial context.³⁵¹ But state practice does not support this conclusion. There are states that apply the tort exception and states that do not.³⁵² And even those that do, do so differently.³⁵³ In addition, the tort exception

³⁴⁸ See Dellapenna, *supra* note 13, at 61, concluding ‘that consensus exists only at a rather high level of abstraction’, which necessarily implies a certain amount of agreement. Jennings and Watts, *supra* note 13, at 342–343, even though emphasizing substantial difference in national court decisions, concede a general understanding of sovereign immunity.

³⁴⁹ For a brief description of the most fundamental differences see *supra* at sect. 3.

³⁵⁰ A minor exception must be added for those states which have ratified the ECSI. In relation to each other they are obliged to give full effect to this exception, whereas they would be legally prohibited from doing so in relation to states which have not ratified the ECSI – at least if sovereign immunity is the default rule and exceptions to this default rule must be supported by customary international law.

³⁵¹ It is quite interesting that the private–public distinction and the commercial exception are usually used synonymously, even though the former has a more far-reaching scope of application than the latter; for a more detailed discussion see *supra* at sect. 3.

³⁵² In particular civil law countries like the US and the UK which have enacted national sovereign immunity laws apply the tort exception on basis of these laws: § 1605(a)(5) FSIA and sect. 5 of the State Immunity Act 1978. The ECSI and the UNCJSI also provide for a tort exception, for details see *supra* at sect. 4.

is not the only exception to sovereign immunity which is applied by some, but not by all states. The FSIA, for example, has been amended over the years and now contains exceptions *inter alia* for cases in which property is expropriated in violation of international law,³⁵⁴ and cases in which money damages are sought for personal injury or death which is caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking.³⁵⁵ Even though additional requirements must be met in order to establish jurisdiction in US courts, and even though these requirements limit the application of the exceptions considerably, the FSIA still provides for jurisdiction of US courts over foreign states in cases of official conduct.³⁵⁶

It is not only the current state practice that supports the view of sovereign immunity as a principle, but also its theoretical underpinnings. The correct basis of sovereign immunity in international law is hotly debated. Scholars and courts usually refer to *par in parem non habet imperium*, the principle of sovereign equality and independence, even though much more emphasis should be placed on the aspect of independence than on equality.³⁵⁷ However, the claim of unimpaired sovereignty by the foreign state clashes with the claim of territorial sovereignty of the forum state. And no matter how we look at it – from the angle of either the forum state or the foreign state – neither of the two claims can assert to be higher ranking in principle.³⁵⁸ [T]he rule's content cannot be construed so

³⁵³ The ECSI and the State Immunity Act explicitly exempt acts of the armed forces from the tort exception, whereas the FSIA and the UNCJIS do not include such a counter-exception; at least explicitly; see *supra* at sect. 4.

³⁵⁴ § 1605(a)(3) FSIA as long as the expropriated property is present in the US and linked to commercial activities carried by the foreign state within in the US.

³⁵⁵ The so-called terrorism exception also applies if material support or resources for acts of torture, extrajudicial killing, aircraft sabotage, and hostage taking is provided. But the act itself or the provision of material support or resources must be 'engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency', and it applies only to states that are designated as state sponsors of terrorism; for more details see § 1605A FSIA.

³⁵⁶ The judgments which have been issued against states acting in their official capacity are listed by the Corte di Cassazione in *Ferrini*, *supra* note 7, at 673.

³⁵⁷ See the accompanying text to *supra* note 58.

³⁵⁸ It is quite surprising that most scholars usually acknowledge the competing/ 'sovereignty claims' of the forum state and the foreign state, but at the same time assume that either one of them is generally less relevant: see, e.g., Lauterpacht, *supra* note 25, at 290 (over)emphasizing the principle of territorial sover-

as to protect the autonomy of only one of the disputing States – this would look like a totalitarian way of violating sovereign equality. The problem appears rather to lie in delimitating or balancing the conflicting sovereignties.³⁵⁹ States are therefore faced with the task of balancing these two principles – whereby sovereign independence and equality are equated with immunity of the foreign state – in order to determine specific rules concerning the conditions under which foreign states are accorded sovereign immunity within their jurisdiction.³⁶⁰

But who is authorized to conduct the balancing of principles in order to reach specific rules? The answer to this question is of fundamental importance for all cases in which national decisions and practice are scrutinized by an international court or tribunal, as in the current ICJ case, *Jurisdictional Immunities of the State* between Germany and Italy. Practice seems to support the claim that the states themselves have the power to do so. The common law countries in particular have enacted national legislation on sovereign immunity which can be understood as an exercise of their balancing power. Still, this fact does not provide sufficient proof that a court like the ICJ is barred from reviewing the results of the balancing process. But if international law does not oblige states to behave in a specific way because they have not agreed on precise rules, but only on an abstract principle, and if states are thus free to determine the rules within the limits set by international law, then it is not for the courts to second-guess the balancing process in detail. Otherwise it would be the courts and not the states that actually make these rules. There may be situations when international courts are asked and even obliged to specify the meaning of a principle for a certain

eignty, while supporters of state right to sovereign immunity largely neglect any legitimate claim of the forum state.

³⁵⁹ M. Koskeniemi, *From Apology to Utopia* (1989), at 433.

³⁶⁰ It seems as if the *Corte di Cassazione* in *Ferrini* actually applied such a balancing approach even though its terminology with regard to the legal nature of sovereign immunity is inconsistent: see the text accompanying *supra* notes 71 and 90. De Sena and De Vittor, *supra* note 7, at 89 interpret *Ferrini* in a similar fashion, even though the principles involved are the territorial sovereignty of the forum state, on the one hand, and the sovereign independence of the foreign state on the other, and not the sovereign equality of states and the protection of inviolable right. The latter may influence the outcome of the balancing process, but it cannot override the limits set by the sovereign independence of a state, at least in cases in which these rights are not enforced by the international community of states, but by a single state alone.

case, especially when such a principle is relevant for determining the meaning of an existing rule. But as long as such a rule does not yet exist, since it has to be derived from the specification of a principle or the balancing of conflicting principles, states are generally free to make their decisions according to their policies.

A critique of this approach could refer to the fact that the international community – at least since the advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case³⁶¹ – has rejected the traditional ruling of the PCIJ in the *Lotus* case according to which states are free to act as long as they are not restricted by a rule of customary international law and treaty law.³⁶² The international system has changed from the coordination of independent, self-contained states to a regime of interdependence and cooperation.³⁶³ But even if we assume that this observation is an accurate description of contemporary international law, is it really true that the right to balance conflicting principles in the absence of specific rules is nothing other than ‘Lotus in disguise’? The underlying problem for the ICJ in *Legality of the Threat or Use of Nuclear Weapons* was that if the Court applied the *Lotus* doctrine, it had to stipulate ‘a right in law to act in ways which could deprive the sovereignty of all other States of meaning’.³⁶⁴ I do not think that such a consequence would result from holding that states are free to determine the scope of sovereign immunity within their borders in the absence of specific rules. In addition, I will show that international law actually prescribes limits on states’ freedom to act, limits which are based on competing principles.³⁶⁵ Unlike France in the *Lotus* case, states are thus not required to prove the existence of a specific rule which restricts the other state’s freedom to act. If we accept that norms, particularly those of international

³⁶¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226.

³⁶² *The Case of the S.S. ‘Lotus’ (France v. Turkey)*, 7 Sept. 1927, PCIJ, Ser. A., No. 10, 1927.

³⁶³ On the notion of cooperation and how it changed the conception of public international law see C. Friedman, *The Changing Structure of International Law* (1964), at 10, 63.

³⁶⁴ *Legality*, *supra* note 118, Dissenting Opinion of Judge Shahabuddeen, at 393 ff.

³⁶⁵ See *infra*, at sect. 8 D.

custom, are sometimes better described as principles than rules, then we must decide who is authorized to develop specific rules from these principles: the individual state or international courts? The problem is therefore not one of the fundamental nature of the legal system; it rather refers to who is making which decisions. The *Lotus* case stipulated a presumption that everything not prohibited by custom or treaty is allowed. But the balancing of conflicting principles neither rests on nor reinforces this presumption and should therefore be treated differently.

D The Limits to the Freedom of States

Because sovereign immunity is a principle and not a rule, international courts and tribunals may only scrutinize whether a state has violated the boundaries set by international law that a state must observe when balancing its territorial sovereignty and the sovereign independence of foreign states. These limits of international law restrict not only the freedom of states to grant, but also their freedom to deny, sovereign immunity to foreign states within their jurisdiction.

As shown above, granting immunity either in cases of fundamental human rights violations or in cases in which a foreign state (including its armed forces) has caused personal injuries on the territory of the forum state (including armed conflict) does not violate international law. The only possible constraint is the restrictive theory of sovereign immunity: a state may not grant immunity to private acts of a state, even though it has considerable freedom to determine the criteria by which it defines what constitutes a public and what a private act.

The limits that prevent the forum state from denying sovereign immunity to a foreign state are much more difficult to determine. In our effort to define these limits, we should recognize the link between jurisdiction and immunity. True, the ICJ treats jurisdiction and sovereign immunity as two distinct categories.³⁶⁶ But it is undeniable that both concepts are based on the same competing principles: the

³⁶⁶ *Arrest Warrant*, *supra* note 3, at para. 59.

territorial sovereignty of the forum state and the sovereign independence of the foreign state.³⁶⁷

As a consequence, recent years have shown a growing tendency to link the outer limits of denying immunity to the lawful exercise of jurisdiction: as long as jurisdiction can be established, states can and, in the view of some authors at least, should deny immunity, especially in cases of fundamental human rights violations.³⁶⁸ But this concept, apart from eliminating immunity as a distinct category, runs the risk of neglecting important differences in the concept of jurisdiction in general and sovereign immunity in particular. Jurisdiction and its limits have developed differently depending on the subject matter. The jurisdiction to adjudicate in civil matters has, for example, developed mainly in the context of private international law, even though it is not unrelated to public international law.³⁶⁹ Immunity, on the other hand, is linked to official acts of a state (if we accept the principal distinction between private and public acts) and is therefore more sensitive to the sovereignty of the foreign state. Linking immunity to the limits of jurisdiction to adjudicate in civil matters would therefore mean disregarding the official character of the foreign state's conduct.

Another conception of sovereign immunity, which would allow for taking these aspects into account, is to think of immunity not as a distinct category, but as a special form of jurisdiction that the forum state can exercise if a state in its official capacity is involved. The most difficult problem is, of course, drawing the limits of this concept of jurisdiction. As already noted, it is sovereignty understood as

³⁶⁷ C. Ryngaert *Jurisdiction in International Law* (2008), at 6; Muse, 'A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996)', 30 *George Washington J Int'l L & Econ* (1996/97) 207, at 241–242 and Oxman, 'Jurisdiction of States', in R. Wolfrum (ed.), *Encyclopedia of Public International law* (online), at para. 1 are of a similar view.

³⁶⁸ Caplan, *supra* note 28, at 778; see also Novogrodsky, *supra* note 77, at 948 ff, suggesting that Canada should add an additional exception to its State Immunity Act for cases of fundamental human rights violations as long as the plaintiff is a Canadian citizen at the time when he takes legal action against the foreign state in Canada. In justifying this amendment he argues that the citizenship requirement establishes the necessary nexus or link between the territory of the forum state and the case. Novogrodsky thereby exclusively relies on the concept of jurisdiction and, at least implicitly, rejects the one of sovereign immunity as a distinct category.

³⁶⁹ Oxman, *supra* note 124, at para. 7.

independence rather than the concept of sovereign equality which should guide us.³⁷⁰ Independence is based on the idea that states enjoy some sort of external sovereignty, especially vis-à-vis other states. These 'other states' (but not necessarily the international community of states) must respect actions taken by a foreign state within its own territory which affect its own citizens.³⁷¹ Yes, these actions may violate public international law and they can, for example, trigger the response of the international community in the form of binding Security Council resolutions. But it is not for the individual states to judge these actions, which took place within the territory of another state, by their own standards.

Quite different, however, are situations in which a foreign state acts on the territory of another state, especially when affecting the forum state's citizens. Such acts are often in themselves a violation of the forum state's sovereignty. In addition, a strong and legitimate link exists between the case and the forum state. A state may therefore legitimately decide to exercise its jurisdiction and to deny sovereign immunity to the foreign state even when acting in its official capacity. This would also include acts committed by the armed forces of the foreign state during armed conflict because the fact that armed forces and armed conflict are involved does not make the claim of the foreign state stronger or the claim of the forum state weaker. There are, of course, doubts whether municipal courts are suitable for dealing with these kinds of cases at all. But such doubts are based on practical obstacles and do not change the fact that by denying jurisdiction, the forum state legitimately exercises its territorial sovereignty.

But cases in which a foreign state acts on the territory of the forum state must be distinguished from cases in which the national of the forum state is subject to actions of the foreign state within its territory. Within a criminal law context the jurisdiction of the forum state would be based on the disputed passive personality principle: states assert the right to try a foreigner for injuring a national of the

³⁷⁰ See the text accompanying *supra* note 58.

³⁷¹ Hess, *supra* note 39, at 311.

state outside the territory of that state.³⁷² But in the case of jurisdiction in civil matters, the term ‘passive personality’ principle is misleading. It is the national of the forum state who has been affected and who is trying to assert her rights against the foreign state. In determining the significance of the forum state’s external sovereignty in such a case, it is important to consider that the foreign state acted *vis-à-vis* citizens of another state and not its own. A state may rely on sovereignty understood as independence only if it does not internationalize the issue itself, which it does in cases that involve the nationals of another state. However, the state has a right that its conduct is judged not by the standards of the forum state, but by either its own or international standards based on treaty or custom. To complicate matters, it is of course possible, as in *Bozouri v. Iran*, that the applicant, while being the national of the foreign state during the acts in question, acquires the nationality of the forum state before or even during the trial.³⁷³ Still, at the time of conduct such a case is identical to those in which the claim for independence of the foreign state is strongest: when acting *vis-à-vis* its own nationals on its own territory. If the principle of sovereign immunity is to have any discrete meaning and exist as an independent concept, these cases must be treated alike. States are therefore prohibited from denying sovereign immunity if the claimant acquires the forum state’s nationality after the conduct in question occurred.

International law obviously limits the legal ability of states to determine the scope of sovereign immunity within their legal orders: states may not award immunity for acts *iure gestionis*, but must do so when the foreign state acts in its official capacity on its own territory *vis-à-vis* its own citizens at that time. Everything else is up to the forum state: it may, but does not have to, grant sovereign immunity depending on its political preferences.³⁷⁴

³⁷² Oxman, *supra* note 124, at para. 34 ff; Shaw, *supra* note 100, at 589 ff.

³⁷³ *Bouzari v. Iran*, *supra* note 77, at para. 15.

³⁷⁴ The freedom of the forum state to determine the scope of sovereign immunity within its legal order has been particularly emphasized by US scholars as well: see, e.g., Caplan, *supra* note 28. But they base their claim on the assumption that the jurisdiction of the forum state serves as the default rule and sovereign immunity as an exception to it. States are therefore free to determine the limits of sovereignty and are only required to award immunity in case of state conduct that ‘collectively benefits the community of nations’: *ibid.* at 744. However, the scope of immunity is something which is determined by the behaviour of states

4.9 Remarks: *Germany v. Italy*

Sovereign immunity is a principle, not a rule. But what implications does this have for the pending case between Germany and Italy before the ICJ? Though it does not alter the overall legal question – did Italy, by denying immunity for the acts committed by the German *Wehrmacht* during WWII, violate international law? – it influences the way in which the ICJ must answer it. This answer does not depend on the existence of a rule under customary international law that allows for denying immunity in cases of torts committed by a foreign state on the territory of the forum state during an armed conflict. It is the very nature of a principle that it can be specified in different ways. The essential problem therefore is whether in doing so Italy has violated the limits set by international law.

The analysis has shown that if the conduct of the *Wehrmacht* had taken place today, Germany would lose the case.³⁷⁵ But what consequences arise from the fact that 65 years have passed since the end of World War II? States at that time usually granted absolute sovereign immunity even though they were not legally required to do so. Sovereign immunity was a principle back then just as it is today. The fact that most, but not all, states awarded immunity without exception does not mean that they could not have done otherwise. Even 65 years ago, international law would have allowed Italy to deny immunity for acts committed by

and not by logic. Thus, framing the issue just the other way round does not necessarily explain why states enjoy considerable freedom to make their own policy decisions. States could have accepted so many exceptions as a matter of international custom that the freedom to act would have been reduced considerably. In addition, the requirement of state conduct which collectively benefits the international community is hardly helpful. It focuses exclusively on the protection of human rights and not the maintenance of international peace and security. These two aspects are of course intertwined, but policy-makers and scholars have argued that sovereign immunity is actually necessary for preserving and retaining good relations among states: see, e.g., Al-Adsani, *supra* note, at para. 54. What constitutes behaviour which collectively benefits the international community thus depends on what international law is all about: states and their relations to each other or the protection of fundamental human rights. But this question has not been answered in one or the other way.

³⁷⁵ Special problems might arise on the enforcement level which have not been discussed in this article.

Germany in Italy *vis-à-vis* Italian citizens during World War II. The crucial point, however, is that Italy actually did award immunity, at least for acts *iure imperii*. The relevant focus for deciding the case therefore shifts significantly. The outcome now depends on whether Germany may rely on the fact that states until recently regularly awarded immunity in comparable cases, instead of an alleged right to sovereign immunity. To make such a claim, Germany must actually show that not only courts in general, but the *Corte di Cassazione* in particular has decided a comparable case and has therefore created a precedent that Germany could rely on.³⁷⁶

If that is the case, the ICJ must decide whether Germany's reliance claim is a matter of international law. The US Supreme Court, for example, decided that the FSIA applies even if the facts of the case took place before its enactment.³⁷⁷ But how to apply the FSIA is surely a domestic legal question, and Italy, in order to determine the scope of sovereign immunity, applies customary international law which, according to Article 25 of the Italian Constitution, is part of the Italian legal system. Still, even though sovereign immunity constitutes a principle of international custom, it must be specified in order to apply within the Italian legal order. If enacting domestic legislation transforms sovereign immunity into a domestic matter, what about a judgment of a national court which specifies an international law principle: is it national or international law? Italy could at least argue that specifying sovereign immunity makes it a domestic legal question.

Still, should the ICJ decide that it actually faces a matter of international law, it has to determine whether Germany can rely at all on how an international law principle is specified by a domestic court and, if so, for how long. This problem is obviously of a more general nature than the limits of sovereign immunity under

³⁷⁶ The term 'precedent' does not suggest that the *Corte di Cassazione* is legally bound by its previous judgments (*stare decisis*), which is a matter of national and not international law anyway. Instead it is merely used to illustrate the basis for a possible reliance claim. Even though claiming reliance is closely connected to the problem of retroactivity, it must be distinguished from questions of inter-temporal application of the law.

³⁷⁷ *Austria v. Altmann*, *supra* note 12.

customary international law.³⁷⁸ Answering this and the abovementioned questions is not part of the present analysis. However, one should bear in mind that the ICJ itself considers sovereign immunity as a procedural right and not a substantive one,³⁷⁹ and that, as a matter of principle, reliance on a procedural right does not qualify for as much protection as reliance on a substantive right.

³⁷⁸ That the US Supreme Court applied the FSIA retroactively has no bearing on deciding this question. The Supreme Court based its decision on the text of the FSIA which provides in § 1602 that 'claims of foreign states to immunity should *henceforth* be decided . . . in conformity with the principles set forth in this chapter' (emphasis added). It is therefore misleading to suggest, like Gattini, *supra* note 7, in note 68, that the decision of the Supreme Court in *Altmann* anticipates the outcome under customary international law, especially considering that sovereign immunity does not constitute a specific rule and state right, but only a principle.

³⁷⁹ *Arrest Warrant*, *supra* note 3, at para. 60.

CHAPTER 5

CONCEPT OF UNIVERSAL JURISDICTION UNDER INTERNATIONAL CRIMINAL LAW

5.1 UNIVERSAL JURISDICTION IN INTERNATIONAL LAW

The concept of jurisdiction is integral to the sovereignty of States and is fundamental to the functioning of the international legal system. Judge Rosalyn Higgins, the President of the International Court of Justice describes jurisdiction as an allocation of competence to States, which is important for the avoidance of conflict of authority. Jurisdiction in international law is essentially the competence of States to exercise lawful authority over persons, territory as well as events. Jurisdiction may be civil or criminal (regulatory) in nature. The typology of jurisdiction includes prescriptive jurisdiction (authority to make laws) and enforcement jurisdiction (authority to apply and enforce laws). There are different bases for the exercise of jurisdiction, including territoriality, nationality, protective, universality and the more controversial passive personality and effects principles.

5.2 ORIGIN AND NATURE

There is generally no agreed doctrinal definition of universal jurisdiction in customary and conventional international law. However, this does not preclude any definition, which embodies the essence of the concept as the ability to exercise jurisdiction irrespective of territoriality or nationality. Therefore, the concept of universal jurisdiction applies to a situation where “the nature of (an) act entitles a State to exercise its jurisdiction to apply its laws, even if the act has occurred outside its territory, has been perpetrated by a non-national, and even if (its) nationals have not been harmed by the acts.” The Princeton Principles on Universal Jurisdiction provide that universal jurisdiction pertains broadly to the power of States to punish certain crimes irrespective of the place committed and by whom committed (i.e. in the absence of other grounds for the exercise of jurisdiction).

Universal jurisdiction is not without controversy and this extends to its history as well as its applicability. While authors like Henry Kissinger, The former Secretary of State of the United States of America, have challenged the principle of universal jurisdiction to be novel, earlier indications of the principle go back to the international crime of piracy. Customary international law proscribes the crime of piracy and the exercise of universal jurisdiction by States over pirates is accepted in customary international law. Article 19 of the 1958 Geneva Convention on the High Seas and Article 105 of the 1982 United Nations Convention on the Law of the Sea codify this customary rule that,

“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”

Jurisdiction is imperative for the protection of rights and interests. However, certain fundamental rights cannot be adequately secured by a few States or through a “framework of bilateral relations” alone. To ensure effective protection and enforcement of these international interests a mechanism that would involve the generality of the world community is sought to be achieved through universality. It has been argued that, “international law provides that certain offences may be punished by any State because the offenders are common enemies of all mankind and (as such) all nations have an equal interest in their apprehension and punishment”. The concept of universal jurisdiction is based on functionality in view of the decentralised nature of the international system; a feature that makes it difficult for the system to enforce its fundamental laws.

The exercise of jurisdiction by States on grounds of universality of interest has been likened to the principle of *actio popularis* in Roman Law which gave every member of the public the right to take legal action in defence of public interest, whether or not one was affected.

Usual notions regarding the nature of universal jurisdiction is that it applies to acts which are so heinous that every State has a legal interest in the enforcement of these acts, largely because they violate obligations owed to the international community as a whole (obligations *erga omnes*). The term, 'obligations *erga omnes*', which is commonly used with regard to the concept of universal jurisdiction was introduced into mainstream international legal language by the International Court of Justice in the Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain). The Court stated that,

"...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."

The Court further gave what it considered to be examples in contemporary international law of acts that attract this type of obligations, and they include acts of aggression, genocide, the basic rights of the human person, including protection from slavery and racial discrimination. However, the fact that an act is in breach of an obligation *erga omnes* does not mean that universal jurisdiction extends to such an act.

5.3 SCOPE AND APPLICABILITY

The controversy surrounding the concept of universal jurisdiction is not whether the concept validly exists as a basis for jurisdiction in international law but rather the scope of its applicability. Universal jurisdiction does not apply to all international crimes, but rather to a very limited category of offences. Universal jurisdiction over acts of piracy is well established in international law. The fact that pirates were regarded as Stateless persons coupled with the fact that acts of

piracy were committed on the high seas outside the territorial jurisdiction of States would have meant that pirates were completely outside the ambit of the law. That States would have not have had the right to exercise jurisdiction over pirates necessitated a means of asserting some sort of universal jurisdiction over them as common enemies of mankind.

It seems common place in contemporary times and discourse to assume that international crimes like slavery, slave trade, genocide, war crimes, crimes against humanity, apartheid, torture, terrorism and hijacking attract universal jurisdiction because of the moral heinousness of these crimes. Moral heinousness however, is not to be equated with universal jurisdiction. . The issue of whether there exists universal jurisdiction over a crime is dependent on general international law and the subtleties of international rule-making. However, the categorization or proscription of an act as an international crime is not enough to ascribe universal jurisdiction to States for the proscribed act.

It is common to find general and expansive assertions including a wider range of international crimes, than is actually the case, within the remit of universal jurisdiction. For instance, the Third Restatement of the Law: The Foreign Relations Law of the United States mentions the offences of piracy, slave trade, genocide, war crimes, attacks on or hijacking of aircrafts, and presumably certain acts of terrorism as falling within the scope of the concept of universal jurisdiction. It is also not uncommon to find some commentators, especially within the field of international relations, and human rights organisations and NGOs adopting this expansive view of universal jurisdiction.

The issue of universal jurisdiction over the international crime of slavery and slave trading, contrary to commonly held opinion is not as straightforward as the crime of piracy. It has also been contended that the recognition of universal jurisdiction over slavery and slave trading can be traced to the Geneva Convention on the High Seas, the United Nations Convention on the Law of the Sea, the 1926 Convention To Suppress the Slave Trade and Slavery and its Protocol in 1953 and Supplementary Convention in 1956. However, there is

nothing in the text of these provisions conferring States with universal jurisdiction, indeed most of the provisions direct its obligations to the High Contracting Parties; obligations which the parties contractually agreed to and can denounce. Professor Kontorovich argues that,

“At most, international treaties on slave trading created “delegated jurisdiction” whereby several nations conveyed to one another the right to exercise some of their jurisdictional powers with respect to a particular offence, effectively making each State an agent of the others. Since such arrangements rest on State consent and the traditional jurisdiction of each State party to the agreements, they in no way...can be considered as examples of universal jurisdiction”.

Proponents of universal jurisdiction over slavery and slave trading, like Kenneth Randall concede that the international instruments on slavery do not explicitly confer universal jurisdiction, however they assert that such universal jurisdiction exists in customary international law. They argue that customary international law as seen in the extensive efforts to abolish slavery, even in the absence of explicit provisions in international instruments on slavery providing for universal jurisdiction, sustains universal jurisdiction over these crimes. However, it is doubtful if customary law sustains this assertion because to the extent that the requirements for a rule to emerge as custom in international law include State practice in support of the rule together with *opinio juris*, no State practice exists where States have assumed universal jurisdiction over slavery and slave trade.

The Statutes of the Tribunals established after the World War in 1945 in Nuremberg and in the Far East (Tokyo) did not provide that universal jurisdiction exists for crimes against humanity, neither do the trials conducted under the Statutes and the various war crimes trials conducted in the aftermath of the War support universal jurisdiction for war crimes. This is because the trials were part of the terms of surrender of the vanquished States to the victorious Allied Powers. However, it would seem that universal jurisdiction arguably extended in the wake of World War II to crimes against humanity as evident in the trial of Adolf Eichmann in Israel in 1961. Eichmann, an official in the German Reich,

who was implicated in the Holocaust was kidnapped from Argentina and brought to trial in Israel. While States like Argentina objected to the violation of its territorial sovereignty and the manner of securing the presence of Eichmann in Israel, there were no objections to the grounds on which Israel asserted jurisdiction, which included universal jurisdiction. Further to this, the United States, in the case of *Demjanyuk*, accepted that a person implicated in the Holocaust could be extradited to Israel which could exercise jurisdiction over persons accused of perpetrating the Holocaust.

Universal jurisdiction has also been argued to have extended to certain crimes where multilateral treaties codifying these crimes such as the Rome Statute of the International Criminal Court stipulate that States within whose territory persons guilty of such crimes are found are under a duty to prosecute or extradite (*aut dedere, aut judicare/ punire*) such persons. International instruments on genocide, war crimes, hijacking, torture and terrorism contain provisions obligating States to exercise jurisdiction over certain acts or extradite accused persons to other States for trial.

With regard to the so-called treaty-based universal jurisdiction (*aut dedere, aut judicare*), resort is to be had to the language of the specific treaties. The Convention on the Prevention and Punishment of the Crime of Genocide 1948 does not contain an express provision mandating State parties to assume jurisdiction over crimes of genocide by prosecuting accused persons or to extradite such persons. The Genocide Convention does not impose an obligation to prosecute or extradite, rather it expressly provides that trials are to be by

“a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

The Convention also provides in Article VII that,

“Genocide ...shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”

The logical interpretation of these provisions can only, therefore, either be that proceedings for genocide may be brought by States, which are obligated to exercise jurisdiction where there is a territorial jurisdictional link, or that proceedings may be brought before a competent international criminal court. Where genocide has been committed and extradition is sought, parties to the Convention cannot qualify the genocide as a political offence for which there can be no extradition but rather to grant the extradition in accordance with its own national laws; extradition being dependent on the existence of a treaty or agreement in the absence of which there is no obligation to extradite. However, these provisions of the Genocide Convention have been progressively interpreted as including a “potential” for universal jurisdiction”.

International instruments regarding war crimes and torture are more explicit in their provisions regarding the issue of ‘treaty-based universal jurisdiction’. Articles 49, 50, 129 and 146 of the first, second, third and fourth of The Geneva Conventions 1949, provide that,

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed...grave breaches and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”

It is easily assumed that there is universal jurisdiction for war crimes. A leading expert on war crimes and international criminal law writes that there are no specific provisions within the Conventions for universal jurisdiction, but that it is implicit in the penal duty to enforce the grave breaches of the Convention that Parties exercise universal jurisdiction under their national laws. He posits that

universal jurisdiction over war crimes is fuelled by the writings of academics and experts, rather than the Conventions. The Conventions require States to pass domestic legislation to facilitate jurisdiction, but unfortunately many States are yet to do this. The Conventions hold pride of place as multilateral international agreements because of the near universality of participation of States who have ratified the Conventions. Universality in the scope of Conventions does not automatically mean that the Convention provides for universal jurisdiction, however if the near universal ratification of the Conventions is backed by the enactment of national legislations in States as required, then it becomes difficult to argue against universal jurisdiction for war crimes.

With regards to hijacking of aircrafts, the Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft 1963 is clear in its provisions. The Convention does not provide for universal jurisdiction but rather it provides for jurisdiction on grounds of registration of the aircraft. In the absence of registration jurisdiction can then be founded on effects in territory, nationality or residence of affected persons, violation of security of the State or violation of its laws and obligations under any multilateral international agreement. Both the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 extend the grounds of jurisdiction contained within the Conventions and provide that,

“The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.”

The provisions of the Montreal and Hague Conventions seem to embody universal jurisdiction, however Judge Higgins strongly refutes this arguing that,

“...[I]t is still not really universal jurisdiction *stricto sensu*, because in any given case only a small number of contracting States would be able to exercise

jurisdiction on the basis of Articles 2, 4, and 7. All that is ‘universal’ is the requirement that all States parties do whatever is necessary to be able to exercise jurisdiction should the relatively limited bases of jurisdiction arise in the circumstances. Contrary to the views sometimes expressed elsewhere, this is not treaty-based universal jurisdiction (and so the question of such treaty basis ‘passing into’ general international law does not arise.”

Similarly, the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973 contains an undertaking by Parties in Article 4 to adopt legislative, judicial and administrative measures for the exercise of jurisdiction over persons accused of apartheid, irrespective of territoriality and nationality.

The Convention on Prevention and Punishment of Crimes against Internationally Protected Persons 1973 provides for States to exercise territorial, nationality and flag jurisdictions. Article 7 of the Convention further provides that, “The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.”

There is nothing in the text of the Convention, which expresses any form of universal jurisdiction. Unlike the Hague and Montreal Conventions, and indeed other international multilateral agreements which have adopted the standard formulation in Article 7 of the Hague and Montreal Conventions, the Convention on Prevention and Punishment of Crimes against Internationally Protected Persons does not obligate States to extradite alleged offenders, it only obligates States to exercise jurisdiction, if the alleged offender is not extradited. This is clear from a comparative reading of the Conventions.

The International Convention against the Taking of Hostages 1979, provides in Article 5 that States parties are to exercise jurisdiction on the basis of

territoriality, habitual residence (for Stateless persons), nationality of offender and victim, and where the unlawful act was done to compel the State to do or to abstain from doing an act. Like Article 7 of the Convention on Prevention and Punishment of Crimes against Internationally Protected Persons, Article 8 of the Convention against taking of Hostages again obligates States to exercise jurisdiction, if the alleged offender is not extradited.

In *United States v. Yunis*, the courts of the United States exercised jurisdiction over a Lebanese national and resident who was charged for the hijacking of a Jordanian civil aircraft in the Middle East in 1985 involving some nationals of the United States. The case has been celebrated as “a resounding acceptance of universal and passive personality principles as sufficient bases under international law for a State to assert jurisdiction over an extra-territorial crime...” However, the Hostages Convention provided expressly for the exercise of jurisdiction on grounds of nationality of victim.

The Convention on Physical Protection of Nuclear Material 1980 does not include universal jurisdiction, rather it provides for the exercise of jurisdiction under the Convention on grounds of territoriality or aboard a ship or aircraft registered in the State (flag) and nationality of the offender. It mandates parties to exercise jurisdiction where the offender is within its territory, and it does not extradite the alleged offender.

In addition to providing for jurisdiction, in Article 5, on nationality and territorial grounds, the Convention against Torture and other Cruel, Inhuman or Degrading Punishment 1984 expressly contains the expansive obligation of States to either prosecute or extradite (*aut dedere, aut judicare*) alleged offenders. Article 7 of the Convention provides that if a State party in whose territory a person accused of torture is found shall extradite him or submit the matter to its competent authorities for prosecution. The decision of the House of Lords of the United Kingdom in the case of Pinochet was focused on the obligations of Chile, Spain and the United Kingdom under the Torture Convention rather than on whether the Convention provided for universal jurisdiction for acts

of torture. The extradition request sought by Spain did not arise from any claims as to universal jurisdiction, rather it arose from the obligation assumed by Spain under the Convention against Torture.

The United States have asserted expansive civil jurisdiction in relation to torture under Alien Torts Claims Act. In *Filartiga v. Pena Irala*, jurisdiction was assumed at the instance of two citizens of Paraguay over wrongful death resulting from acts of torture carried out in Paraguay by a police official against a Paraguayan citizen. The court of first instance dismissed the case for lack of jurisdiction. Upon appeal, the Court of Appeals held illegal the acts of torture, which violated the prohibition on torture, a norm of customary international law. In that case, the Judge likened the torturer to "...the pirate and slave trader before him; *hostis humanis generis*, an enemy of all mankind".

International efforts at the enlargement of jurisdiction extends to terrorist acts. The International Convention for the Suppression of Terrorist Bombings 1998 provides in Article 6 for the exercise of jurisdiction on grounds of territoriality, flag, nationality (of offender as well as victim), habitual residence in the case of stateless persons, commission of terrorist acts against a State or government facilities abroad (including embassies), compelling a State to do or abstain from an act or onboard any aircraft operated by a State. Article 6(4) further provides that parties to the Convention are to take measures to establish jurisdiction where an alleged offender is present in its territory and it does not extradite the offender. The International Convention for the Suppression of the Financing of Terrorism 1999 and the International Convention for the Suppression of Acts of Nuclear Terrorism 2005 provide for the exercise of jurisdiction on the same grounds as the Convention of Suppression of Terrorist Bombings 1998.

It is doubtful whether the provisions in multilateral conventions as highlighted above which have been regarded as treaty-based forms of universal jurisdiction are in fact universal jurisdiction in *stricto sensu*. The basis for the exercise of the expanded jurisdiction (beyond the accepted territorial and

nationality grounds) proceeds from the agreement of States which are party to the conventions and do not apply to non-party States. Judge Higgins comments that,

“...none of them [the conventions], properly analysed, provides for universal jurisdiction. They provide for various bases of jurisdiction coupled with the *aut dedere aut punire* principle- that is, that a State party to the treaty undertakes to try an offender found on its territory, or to extradite him for trial.”

There is no evidence of established State practice in international law with regard to universal jurisdiction over international crimes as a whole. President Guillaume of the International Court of Justice in the Arrest Warrant case found support with Lord Slynn of Hadley in *Pinochet II* that there is no universality of jurisdiction with regard to international crimes and he further asserted that only piracy is subject, truly, to universal jurisdiction in international law.

From the study of customary international law and treaty law undertaken in this Report, it is evident that universal jurisdiction as a concept of international law exists in relation to acts of piracy, crimes against humanity, war crimes, torture under the Torture Convention, and, potentially, genocide under the Genocide Convention. However, the practice of the matter would be dependent on the extent to which States are bound by the various sources of international law (customary or treaty law) providing for universal jurisdiction.

The International Court of Justice clearly states that,

“the writings of eminent jurists...important and stimulating as they may be, cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm. The assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not, does not evidence an international practice recognized as custom...That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable...Virtually all national legislation envisages links

of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction.”

5.4 EFFECTS

The categorisation of an act as an international crime, likewise the designation of a norm as peremptory in international law (*jus cogens*) does not mean that universal jurisdiction is applicable to such acts. Also the existence of an obligation *erga omnes* regarding the protection of international interest or standard does not mean that States can exercise universal jurisdiction.

The fact that universal jurisdiction may exist with regard to a crime does not mean that this disentitles State officials, including Heads of State, from the jurisdictional immunities obtainable in international law. The International Court of Justice sums up the matter by asserting as follows,

“It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers of Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.”

Judges Higgins, Kooijmans and Buergenthal, in their Joint Separate Opinion in the ICJ decision in the Arrest Warrant Case, upon considerations of the various national legislations and case-law in the United Kingdom, Australia, Austria, France, Germany, Netherlands and the United States, observed that though there may have been efforts to adjudicate over extra-territorial crimes, especially war crimes, there has been no clear instance of an assertion of

universal jurisdiction where there has been no other jurisdictional link, with the exception of Belgium, as evident in the instance before the Court that there cannot be said to be an established practice of the exercise of universal jurisdiction by States in international law.

Due to political pressure from the United States, the controversial universal jurisdiction legislation of Belgium has been amended. This amendment was done in the aftermath of the International Court of Justice decision in the Arrest Warrant and is in line with the Rome Statute of the International Criminal Court. Article 27 of the Rome Statute is to be read together with Article 98 of the Statute, and they both provide, respectively, that,

“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”

and that,

“ The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”

Furthermore, an inherent effect of the concept, especially when misused, is that there is potential for disruption in international relations between States as well as the deprivation of rights and harassment of individuals (especially State officials) and the abuse of legal process.

Moral reprehensibility cannot be equated to universal jurisdiction. The scope, applicability and even the effects of the concept of universal jurisdiction in international law is less than what proponents of the concept advocate it to be. This Report has undertaken an analysis of international law, customary and treaty, which shows that universal jurisdiction exists as a concept in international law and is not a new introduction into the body of international law. It has also highlighted the limited cases in which this type of jurisdiction can be exercised. The expansive approach that has been adopted by proponents of the jurisdiction is policy-oriented and not legally-oriented; and this policy approach may be reflective of a desire of law, *de lege ferenda* (law as it ought to be), and not law, *de lege lata* (law as it is). States jealously guard their sovereignty and as such are hesitant to expand the scope of universal jurisdiction, and with international law being primarily the domain of States, it is States that would determine the scope, applicability and future of the concept. Finally, because of the potentially disruptive effect of universal jurisdiction, it is imperative that disciplines be established regarding regulation of the concept.

5.5 ANALYSIS OF RESOLUTIONS OF THE GENERAL ASSEMBLY AND DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE ON UNIVERSAL JURISDICTION

In this part, the Report provides a critical analysis of relevant resolutions of the United Nations General Assembly and/or decisions of the International Court of Justice on the concept of universal jurisdiction.

5.5.1. THE GENERAL ASSEMBLY

The concept of universal jurisdiction is yet to be substantively deliberated upon by the General Assembly of the United Nations. The involvement of the

Assembly in international rule-making through multilateral conventions, which incorporate what has been referred to as treaty-based universal jurisdiction, under the auspices of the United Nations cannot be considered to be involvement in the development of the concept in international law. This is because the issue of jurisdiction has been ancillary in international conventions and the so-called treaty-based universal jurisdiction has been shown earlier in this report) to be contractual expansion of jurisdiction by the contracting States beyond territoriality and nationality to include the international law principle of *aut dedere, aut judicare/punire* (extradite or punish).

There is discernible practice of the General Assembly to expand jurisdiction of contracting States in international conventions to include the principle of *aut dedere, aut judicare* over certain international crimes. This practice is evident in the Genocide Convention adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, Apartheid Convention adopted by General Assembly Resolution 3068 (XXVIII) of 30 November 1973, Torture Convention adopted by General Assembly Resolution 39/46 of 10 December 1984, Hostages Convention adopted by General Assembly Resolution 34/146 of 17 December 1979, Convention on Internationally Protected Persons adopted by General Assembly Resolution 3166 (XXVIII) of 14 December 1973, and the Convention on Suppression of Terrorism Financing which was adopted by General Assembly Resolution 54/109 of 9 December 1999.

In Resolution 95 (1) of 11 December 1946, the Assembly affirmed the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal. The Charter of the Nuremberg Tribunal did not contain any provision ascribing universal jurisdiction to the Tribunal established under the Charter and neither did the proceedings under the Charter rely on universal jurisdiction. Based on this, United Nations General Assembly Resolution 95 (1) of 11 December 1946 cannot affirm what was not established under the Charter of the Nuremberg Tribunal.

It has been argued that the Princeton Principles on Universal Jurisdiction and supporting materials “have been translated into five languages and distributed as a document of the General Assembly of the United Nations.” However, the Princeton Principles are merely guiding general principles compiled by some academics and jurists which, though may be relied upon by the General Assembly, did not originate from the General Assembly or indeed any body of the United Nations organisation.

5.5.2 THE INTERNATIONAL COURT OF JUSTICE

The issue of universal jurisdiction has come before the International Court of Justice only once, in the Case Concerning the Arrest Warrant of 11 April 2000 (The Democratic Republic of Congo v. Belgium). In that case, the Democratic Republic of Congo challenged the legality of an international arrest warrant issued by a Belgian court for the arrest of Mr Yerodia Ndombasi, the former Foreign Affairs Minister of the Republic of Congo, for crimes against humanity. Belgium had asserted universal jurisdiction based on a Law of 1993, as amended by the Law of 1999 ‘Concerning the Punishment of Serious Violations of International Humanitarian Law’.

The Republic of Congo claimed before the International Court that the universal jurisdiction asserted by Belgium was a violation of the sovereignty of the Republic of Congo and that the non-recognition of the international law immunity of its Minister of Foreign Affairs was a violation of the diplomatic immunity to which the Republic of Congo and its officials were entitled to in international law. Unfortunately, the International Court did not consider the question of universal jurisdiction in its judgment because the parties decided that universal jurisdiction was not in contention between them. The Court decided that it was restricted to the pleadings submitted before it.

However, in their respective separate and dissenting opinions some of the judges considered the concept of universal jurisdiction and its applicability in international law. President Guillaume stated that piracy was the only true case

of universal jurisdiction and that certain international conventions provide for the establishment of “subsidiary universal jurisdiction” where an offender is within national territory of States and is not extradited to another State for trial. He concluded that apart from piracy and instances of “subsidiary universal jurisdiction” under international conventions that “international law does not accept universal jurisdiction; still less does it accept universal jurisdiction in absentia.”

The controversial and unsettled scope of the concept was accepted by the various judges in their opinions. Judge Oda was of the view that universal jurisdiction is controversial and has increasingly been recognised for the international crimes of terrorism and genocide. He supported the Majority Decision in refraining from addressing universal jurisdiction in its judgment because of the undeveloped state of the law with regard to the concept and also because the International Court was not requested to make a decision on the issue. The likelihood and potential for abuse of the concept was highlighted by Judge adhoc Bula Bula in his critique and description of universal jurisdiction as “a ‘variable geometry’ jurisdiction selectively exercised against some States to the exclusion of others.” The Judge argued that even if universal jurisdiction were established in international law that it did not apply to exclude the international law immunities applicable to Mr Ndombasi, irrespective of the crimes alleged against him.

The decision of the majority of the International Court of Justice not to address the issue of universal jurisdiction in the judgment of the Court disregarded the fact that immunities arise in a jurisdictional context and that immunity is not an independent principle of international law but is preceded by the existence of jurisdiction. In their Joint Separate Opinion, Judges Higgins, Kooijmans and Buergenthal correctly asserted that immunity is not “free-standing” but is “inextricably linked” to jurisdiction.

Judge Al-Khasawneh did not consider the issue in his dissenting opinion while Judge Ranjeva in his Declaration supported the decision of the

International Court by declining to address the issue of universal jurisdiction. Judge Rezek briefly considered the issue and stated that the Geneva Conventions of 1949 best exemplify universal jurisdiction and concluded that the Belgian courts lacked jurisdiction to initiate criminal proceedings against an official of the Republic of Congo “in the absence of any basis of jurisdiction other than the principle of universal jurisdiction.”

Among the judges, there was no settled category of international crimes for which universal jurisdiction applied. The most expansive category was adopted by Judge Koroma who stated that,

“The Judgment cannot be seen either as a rejection of the principle of universal jurisdiction, the scope of which has continued to evolve, or as an invalidation of that principle. In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide.”

Judge ad hoc van den Wyngaert was of the view that international law does not prohibit universal jurisdiction for war crimes and crimes against humanity but clearly permits it. The Judge also argued that there is no rule of conventional international law or customary international law prohibiting the exercise of universal jurisdiction in absentia.

An analysis of customary international law and international conventions, as shown in Part I of this Report 1, shows that universal jurisdiction applies to piracy, war crimes under the Geneva Conventions, and potentially to genocide. The so-called ‘treaty-based universal jurisdiction’ is not universal jurisdiction per se but “really an obligatory territorial jurisdiction over persons in relation to acts committed elsewhere.”

In the most detailed analysis of universal jurisdiction in the Arrest Warrant Case, Judges Higgins, Kooijmans and Buergenthal, upon considerations of the various national legislations and case-law in the United Kingdom, Australia,

Austria, France, Germany, Netherlands and the United States, observe that though there may have been efforts to adjudicate over extra-territorial crimes, especially war crimes, there has been no clear instance of an assertion of universal jurisdiction where there has been no other jurisdictional link, with the exception of Belgium. The Judges stated that there cannot be said to be an established practice of the exercise of universal jurisdiction by States in international law because national legislations envisage some sort of link to the forum State. The Judges went further to state that the fact that the practice of universal jurisdiction by States was not established does not necessarily mean that such an exercise would be unlawful.

Universal jurisdiction is yet to substantively come into the deliberations of the United Nations General Assembly. As yet, there are no existing Resolutions of the Assembly dealing with the concept. The uncertainty over the scope of universal jurisdiction resonates in any related discourse, and it was unfortunate that the International Court of Justice side-stepped the opportunity to consider the question of universal jurisdiction as it related to the Arrest Warrant case despite the fact that the question was necessary to the findings of the Court. It is hoped that such an opportunity presents itself before the International Court of Justice once again and that the Court rises to the occasion through an incisive, well-considered and well-informed elucidation of universal jurisdiction in international law, as is customary of the Court. It is also further hoped that the International Law Commission of the United Nations takes up the concept of universal jurisdiction so as to assist its developments, as the Commission has done concerning other areas of International Law, including State responsibility.

5.6 INTERNATIONAL ABUSE OF THE CONCEPT OF UNIVERSAL JURISDICTION

The concept of universal jurisdiction is premised on functionality, especially in view of the decentralised nature of the international legal system. Universal jurisdiction enables a far-reaching enforcement and protection of international norms and standards and it also ensures that individuals are not

beyond the reach of law and enforcement. It is inherent in the nature of the concept that the sovereignty of States will be implicated by the exercise of jurisdiction by one State over the acts of another, and as such there is a wide scope for abuse of the concept. A leading commentator and international criminal law expert advocates that,

“Unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between States, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory. Universal jurisdiction must therefore be utilized in a cautious manner that minimizes possible negative consequences, while at the same time enabling it to achieve its useful purposes.”

This Part of the Report considers whether and to what extent the concept of universal jurisdiction has been abused by some non-African States. Appropriate recommendations shall consequently be made to the Executive Council with regards to possible redress by Member States in cases of abuse of universal jurisdiction in international law. With regards to State practice on this score, Belgium and Spain have been in the forefront of assertion of universal jurisdiction and as such the jurisprudence of the Belgian and Spanish courts will form the core of this part of the Report.

5.6.1 BELGIUM

In 1993 Belgium enacted the Law Relative to the Repression of Serious Violations of the International Conventions of Geneva of 1949, and of the Protocols I and II of 1977. This Law permitted individuals, irrespective of their nationality, to file a criminal complaint in a Belgian court against any person for international crimes in violation of the Geneva Conventions and their additional Protocols, even when the acts were perpetrated outside Belgium by non-Belgian nationals against non-Belgians, and outside of Belgium. This law empowered an

investigative magistrate to issue an international arrest warrant against the alleged offender. The Law was later renamed the Law Relative to Serious Violations of International Humanitarian Law in 1999 and was extended to include acts of genocide and crimes against humanity.

By this legislation, Belgium arrogated to itself universal jurisdiction over persons accused of violations of international humanitarian law irrespective of any jurisdictional link it would otherwise have required. Article 7 of the Belgian Law 1993 provided that Belgian courts shall have jurisdiction in respect of the offences contained in the Law wherever the offences may have been committed. Under this Law, many cases were brought against the Israeli Prime Minister Ariel Sharon, the then- Iraqi President Saddam Hussein, Mauritanian President Maaouyaould Sid'Ahmed Taya, Laurent Gbagbo of Ivory Coast, Paul Kagame of Rwanda, Fidel Castro of Cuba, Ange-Felix Patassé of Central African Republic, Denis Sassou Nguesso of Republic of Congo, Yassir Arafat of the Palestinian Authority, Former President Hissène Habré of Chad, former President Augusto Pinochet of Chile, former President Hashemi Rafsanjani of Iran and former Minister of the Interior Driss Basri of Morocco. Complaints were also filed against certain officials of the United States including President George Bush and Colin Powell, the then U.S. Secretary of State in 2003.

Colin Powell, in his capacity as Secretary of State, in 2003 highlighted the problem of harassment, risk and difficulty for public officials to carry out their duties in the face of such intrusive legislation. Due to political pressure from the United States, the controversial universal jurisdiction legislation of Belgium was amended twice in 2003. The amendments were done in the aftermath of the International Court of Justice decision in the Arrest Warrant case and are in line with the Rome Statute of the International Criminal Court.

The first amendment to the Law came in April 2003 and limited the ability of victims to file complaints directly only where there exists a link between Belgium and the offensive act, for instance where the alleged offender is within Belgian territory, if the act occurred within Belgian territory or if the victim of the

act is of Belgian nationality or has resided in Belgium for a period of at least three years.

In the absence of the links stated above, the amendment of April 2003 provided that cases can be brought by the State Prosecutor unless the complaint is manifestly without merit, or the complaint does not allege a violation of the Law, does not fall within the competence of the Belgian courts, or in the interests of justice and respect for the international obligations of Belgium, the case should be transferred to another court, so long as that jurisdiction upholds the right of the accused to a fair trial. Effectively, the 2003 amendment provided that jurisdiction was to be on the traditional grounds of territoriality or nationality. The amendment of the Law also provides for the power of the government to refer certain cases out of Belgium and also for Belgian courts to cooperate with the International Criminal Court.

Despite these amendments, some nationals of Iraq and Jordan filed a criminal complaint in Belgium against a General of the U.S. Army for alleged war crimes during the 2003 invasion of Iraq by the Coalition forces. The Belgian government referred the case to the U.S. but the U.S. was dissatisfied with the Law and threatened that the continued existence of the Law had dire consequences for Belgium's continued status as the host State of the North Atlantic Treaty Organization. Belgium further amended the Law in August 2003, after a criminal complaint was filed against President Bush and Prime Minister Tony Blair of the United Kingdom for the use of force in Iraq in 2003.

As the Law currently stands, complaints can only be filed based on nationality or residence of the offender or the victim. It also gives the State Prosecutor the discretion to initiate proceedings based on respect for the existing international obligations of Belgium. The Law rules out complaints being filed against State Officials, including Heads of State and Foreign Ministers, who are entitled to jurisdictional immunities; and also prohibits enforcement against persons present in Belgium at the official invitation of the Government of Belgium

or in connection with an international organisation in Belgium pursuant to a headquarters agreement.

However before the amendment of the Law, an investigating Magistrate in Belgium issued an international arrest warrant on 11 April 2000 through the Interpol against the then incumbent Minister of Foreign Affairs of the Democratic Republic of Congo, Mr Yerodia Ndombasi, alleging crimes against humanity and breaches of the Geneva Conventions of 1949 and its Additional Protocols. The Congo instituted proceedings before the International Court of Justice contending that Belgium had, by issuing and circulating the arrest warrant, violated the sovereignty and sovereign equality of the Congo as well as violated the diplomatic immunity of its senior State official. The International Court of Justice noted that the Democratic Republic of Congo claimed that, “ the universal jurisdiction that the Belgian State attributes to itself under Article 7 of the Law in question constituted a violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations.”

Unfortunately, the Court came to its decision on grounds other than universal jurisdiction and found that Belgium had failed in its international obligation to the Congo by not respecting the sovereignty of the Congo and the jurisdictional immunity of its Foreign Minister. The parties to the case decided that universal jurisdiction was not in contention between them and the Court's actual decision on the merits was therefore restricted to the pleadings submitted before it.

Despite the decision of the International Court in the Arrest Warrant Case and the amendment of the scope of the 1993 Law, a Belgian judge in September 2005 issued an arrest warrant against the former President of Chad, Hissene Habre. A group of victims, including three Belgian nationals, alleging torture by Habré in Chad filed a criminal complaint against him in Belgium. Although, Belgium discontinued cases against President Bush, U.S. officials and other

cases, it decided to retain the pending cases against Habre of Chad, officials of Rwanda and Guatemala. In September 2005, a Belgian court issued an international arrest warrant against Habré and sought his extradition from Senegal. Habre was subsequently arrested by Senegalese officials but the request for his extradition to Belgium was not granted by the Senegalese courts. The Senegalese President referred the matter to the African Union.

The African Union in January 2006, established a Committee of Eminent African Jurists which was given the mandate to consider the aspects and implications of the case against Habré and option for his trial. The Committee decided on an 'African option' as the solution whereby Senegal, Chad or any African Union member could exercise jurisdiction over the accused person or an ad hoc tribunal could be established in any Member State to try the accused. Based on the recommendations of the Committee of Eminent African Jurists, the African Union decided that the matter fell within the competence of the Union and mandated Senegal to prosecute and ensure the trial of Hissène Habré on behalf of Africa.

5.6.2 SPAIN

Spain has come into the forefront of international law over the issue of universal jurisdiction. Under Article 23 (4) of the Ley Orgánica del Poder Judicial (Judicial Power Organization Act (LOPJ)), Spain has jurisdiction over crimes committed by Spanish or foreign citizens outside Spain, including genocide, terrorism and other crimes in international treaties that Spain is party to. An extradition request by Spain, in 1998, led to the very famous case against Augusto Pinochet of Chile. The Pinochet case was not decided on grounds of universal jurisdiction, but rather jurisdiction over the case was based on the United Nations Convention against Torture and Cruel, Inhuman or Degrading Punishment 1984.

In the Spanish Guatemalan Genocide case, complaints were filed with the Audiencia Nacional for gross human rights violations and the matter was brought

in Spain by Rigoberta Menchu, the Nobel Peace Prize winner, and other persons against several Guatemalan officials, including former Heads of State Gral Efraín Ríos Montt, Oscar Humberto Mejías Victores and Fernando Romeo Lucas García for acts of terrorism, genocide and torture against the Guatemalan Mayan indigenous people and their supporters. The investigating judge accepted the complaint.

Upon appeal, the Spanish Supreme Court held by a very slim majority (8:7), in 2003, that Spanish national interests (a jurisdictional link) had to be affected and solely with regard to the crime of torture for Spanish courts to exercise jurisdiction in the matter. The Court found that the exercise of territorial and international criminal jurisdiction under the Genocide Convention 1948 was not exclusive; and any other criminal jurisdiction capable of being exercised is subsidiary to the provision of Convention. The Majority noted that the Genocide Convention does not provide for universal jurisdiction, and argued that the Convention also does not prohibit it.

The Majority of the Spanish Supreme Court took into consideration the decision of the International Court of Justice in the Arrest Warrant case, although the International Court did not decide on universal jurisdiction. However, like in the Spanish Guatemalan Genocide case what was at stake was the sovereignty of another State. Article VIII of the Genocide Convention provides that a party may call upon the competent organs of the United Nations to take such action under the United Nations Charter as may be appropriate for the prevention and suppression of the acts of genocide. The Majority argued that Article VIII rendered the jurisdiction of Spanish courts effective. This is not a provision for the exercise of universal jurisdiction by States, indeed the Convention contains no such provision. Furthermore, the judges in the Minority misinterpreted the decision of the House of Lords of the United Kingdom in the Pinochet case to the effect that under international law, crimes of jus cogens, including genocide, are punishable by any State. The Pinochet decision, as earlier stated, was based on the Convention against Torture, which Spain, Chile and the United Kingdom were all party to and had contractually agreed to the

exercise of jurisdiction under the Convention. The effect of the designation of a norm as *jus cogens*, does not mean that it can confer a court with jurisdiction which it does not have under international law.

The Spanish Constitutional Court, in 2005, reversed the decision of the Supreme Court and held that Spain could investigate crimes of genocide, torture, murder and illegal imprisonment committed in Guatemala between 1978 and 1986 and that the principle of universal jurisdiction was not dependent on the existence, or otherwise, of national interests. The Constitutional Court was of the view that,

“The Convention’s silence on alternative jurisdictions beyond territorial and international tribunals cannot be read as an implicit limitation. Rather, Article VI of the Convention simply establishes the minimal obligations on States. The obligations to avoid impunity found in customary international law are incompatible with such a limited reading of the Convention and would, perversely, place more stringent limits on the actions of States parties to the Convention than those that applied to non-parties, which could rely on a universal jurisdiction founded in customary international law.”

The Constitutional Court effectively re-instated the criminal complaints and in 2006, an international arrest warrant against those involved in the Guatemalan Genocide.

In another case, asserting universal jurisdiction by the Spanish courts, an Argentine naval officer, Adolfo Scilingo, was charged with torture, illegal detention and killing prisoners by throwing them out off air planes. Scilingo was convicted and sentenced to 640 years imprisonment.

The action of Spain as it concerns universal jurisdiction cannot form the basis of customary international law on the matter, as one instance is not enough to create a rule of custom. A body of practice and *opinio juris* of the generality of

States is required for the formation of a rule of customary international law on universal criminal jurisdiction for genocide and crimes against humanity.

5.7 POTENTIAL FOR ABUSE

The importance of the concept of universal jurisdiction in international law in ensuring that individuals are within the ambit of the law is not to be taken for granted. Likewise, the potential for abuse of the concept is not to be taken for granted. A likely consequence of the abuse of universal jurisdiction would be the problem of judicial chaos that would arise due to a proliferation of litigation and the erosion of the principle of the sovereign equality of States.

The fact that States could use universal jurisdiction as an excuse to pursue citizens of other States should not be in lieu of the principle of the diplomatic protection of nationals abroad. Although this is a discretionary principle, the imperative that motivates a State to resort to universal jurisdiction should be considered to be of a sufficiently compelling factor in favour of invoking diplomatic protection. Under this principle, one State could bring a claim against another, upon exhausting local remedies or invoking exceptions to it, on grounds that such a State has committed a wrong, including the violation of human rights, against its citizens and has failed to provide an appropriate remedy. A case in point is that of *Amadou Sadio Diallo: Republic of Guinea v Democratic Republic of the Congo*. According to the facts of the case, on 28 December 1998, the Government of the Republic of Guinea instituted proceedings against the Democratic Republic of the Congo in respect of a dispute concerning 'serious violations of international law' allegedly committed against Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality. In its judgment on the preliminary objections raised by the Democratic Republic of the Congo, the Court declared unanimously that the application of the Republic of Guinea was admissible in so far as it concerned the protection of Mr. Diallo's rights as an individual.

Universal jurisdiction is subject to the principles of legality in international law, particularly as regards jurisdictional immunities, and where the alleged

offender is outside the State, procedural requirements concerning the extradition (under a treaty) or lawful transfer of such persons, as well as mutual legal assistance where relevant, are applicable. Failure to abide by these would amount to an abuse and a violation of the right to a fair trial, which is a fundamental human right of an accused person enshrined in international treaties and in the constitutions of most countries.

To avoid abuse of jurisdiction, summons to Heads of States to appear in proceedings before the courts of another State must be subject to the consent of the Head of State concerned and diplomatic confidentiality must be kept. Obligations pertaining to these matters were pointed out more recently by the International Court of Justice in its decision on the preliminary objections to its exercise of jurisdiction in the case between Djibouti and France. According to the Court:

‘The consent of the Head of State is expressly sought in this request for testimony, which was transmitted through the intermediary of the authorities and in the form prescribed by law.... This measure cannot have infringed the immunities from jurisdiction enjoyed by the Djiboutian Head of State. Moreover, the Court does not consider that there was an attack on the honour or dignity of the President merely because this invitation was sent to him when he was in France to attend an international conference. The Court observes again that if it had been proven by Djibouti that this confidential information had been passed from the offices of the French judiciary to the media, such an act could, in the context of the attendance of the Head of State of Djibouti at an international conference in France, have constituted not only a violation of French law, but also a violation by France of its international obligations. However, the Court must again recognize, as it has already done regarding the summons of 17 May 2005 (see paragraph 175 of the judgment), that it has not been provided with probative evidence which would establish that the French judicial authorities were the source behind the dissemination of the confidential information at issue here.’

The exercise of universal jurisdiction over State officials, including Heads of State and other senior officials, can result in harassment. This would, no doubt, adversely impact on the effective performance of the official functions of such persons. This harassment and interference could have international repercussions by embarrassing or limiting a State in its conduct of foreign relations which could in turn cause tensions between States or limit their participation in international affairs. The exercise of universal jurisdiction, as an analysis of the cases from Spain and Belgium have demonstrated, is not mandatory and this could lead to States which claim universal jurisdiction under their domestic laws employing it discriminately against nationals of certain States, especially less developed States. The instances of Spanish and Belgian jurisdiction over nationals of Guatemala, Argentina, Democratic Republic of Congo, and Chad point to this.

There is the added danger of forum-shopping where victims of international crimes as well as activists may seek to bring complaints against certain State officials hoping that a State will be able to institute criminal proceedings against these officials.

To safeguard abuse by way of harassment of State officials and forum-shopping, it is important for African States to take specific measures of immunity indicated by the International Court of Justice in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v France*): 'The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.'

However, it is important to note that the likelihood of abuse of a concept in international law does not nullify the existence of the concept or its applicability in

the right circumstances. The potential for abuse is highlighted with a view towards a better understanding and regulation of the concept.

In the event of abuse of the concept of universal jurisdiction, certain avenues for redress may be explored by an aggrieved State. Primarily, legal redress could be sought before the International Court of Justice challenging violation of sovereignty. This was the option that was adopted by the Democratic Republic of Congo against Belgium and the Court decided the case in favour of Congo. Although, the decision of the Court in the Arrest Warrant case was not based on universal jurisdiction for reasons earlier adduced in the Report, some of the Judges (Guillaume, Higgins, Kooijmans, and Buergenthal) in their reasoning and separate opinions state that there is no clear instance of universal jurisdiction in the absence of other existing jurisdictional grounds. It was also the option taken by Djibouti against France and the Court decided, on preliminary matters, in favour of Djibouti in relation to the admissibility of the case and the breach by France of its obligations towards Djibouti with regard to mutual legal assistance in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France).

However, the jurisdiction of the International Court of Justice is not automatic and is based on the consent of the parties to the suit. Furthermore, the parties to the suit can request the Court for an indication of provisional measures under Article 41 of the Statute of the Court so as to preserve the rights of the parties. The Democratic Republic of Congo made a request under Article 41 in the Arrest Warrant case on the same day that it filed an application instituting proceedings against Belgium.

States can also seek political or diplomatic redress through the use of its good offices. The United States through a policy of negotiation and threats succeeded in not only having cases against its officials discontinued in the Belgian courts but also in the amendment of the Belgian Law on universal jurisdiction. Likewise, African States can lodge diplomatic protests objecting to the abuse of universal jurisdiction by some States, especially where a right of

diplomatic protection may be the more appropriate way to proceed in cases concerning nationals of the States concerned.

CHAPTER 6

UNIVERSAL JURISDICTION AND SOVEREIGN IMMUNITY: CONFLICTS

6.1. Introduction

The separate and dissenting opinions and declarations of the judges of the International Court of Justice (ICJ) in *Arrest Warrant*³⁸⁰ invite discussion of what is meant by ‘universal jurisdiction’. This article suggests that the respective judges’ understanding of the concept is debatable, since underlying it is a tendency, when dealing with states’ criminal jurisdiction, to elide prescription and enforcement, as well as an inattention to the question of when the requisite prescriptive jurisdictional nexus must be present. A number of the resulting judicial statements – eagerly looked to as the first by the World Court on national criminal jurisdiction since the *Lotus* case,³⁸¹ over 70 years before-serve, it is argued, as questionable guides to one of international law’s more controversial topics. The various judgments promote regrettable terminology. Moreover, the elision and inattention cited above lead some judges to a contestable finding on the lawfulness of the enforcement *in absentia* of universal jurisdiction, and causes others to underestimate the degree of state practice that exists in support of universal jurisdiction over crimes under general international law.

This article first outlines the basic principles of public international law governing national criminal jurisdiction and then, in this light, highlights and comments on the treatment of jurisdictional issues, especially universal jurisdiction, in the separate and dissenting opinions and declarations in *Arrest Warrant*.

6.2. International Principles Governing National Criminal Jurisdiction

³⁸⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, International Court of Justice, 14 February 2002, available online at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (visited 5 May 2004). The case’s discussion of jurisdiction is limited to the separate and dissenting opinions and declarations.

³⁸¹ *The S. S. Lotus (France v Turkey)*, 1928 PCIJ Series A, No. 10.

A state's 'jurisdiction', in the present context, refers to its authority under international law to regulate the conduct of persons, natural and legal, and to regulate property in accordance with its municipal law. Jurisdiction can be civil or criminal. Only criminal jurisdiction will be discussed here and, as such, only the regulation of the conduct of persons will be considered.

Jurisdiction is not a unitary concept. On the contrary, both the longstanding practice of states and doctrinal writings make it clear that jurisdiction must be considered in its two distinct aspects, viz. jurisdiction to prescribe and jurisdiction to enforce. Jurisdiction to prescribe or prescriptive jurisdiction – sometimes called 'legislative' jurisdiction – refers, in the criminal context, to a state's authority under international law to assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or, in certain circumstances, judicial ruling.³⁸² Jurisdiction to enforce or enforcement jurisdiction – sometimes called 'executive' jurisdiction – refers to a state's authority under international law actually to apply its criminal law, through police and other executive action, and through the courts. More simply, jurisdiction to prescribe refers to a state's authority to criminalize given conduct, jurisdiction to enforce the authority, *inter alia*, to arrest and detain, to prosecute, try and sentence, and to punish persons for the commission of acts so criminalized.³⁸³ Universal jurisdiction, it should be stressed from the outset, is a species of jurisdiction to prescribe.

³⁸² Prescription by judicial ruling occurs most commonly when a court interprets the scope of a statutory offence in such a manner as to extend that scope. In addition, in some common-law countries, certain crimes and their jurisdictional scope are still the creatures of the judge-made law alone. See *infra* note 23 for more.

³⁸³ See, similarly, P. Daillier and A. Pellet, *Droit International Public (Nguyen Quoc Dinh)* (6th edn, Paris: LGDJ, 1999), §§ 334 and 336, respectively, drawing a distinction between 'competence normative' and 'competence d'exécution', i.e. 'une distinction entre l'édiction d'une réglementation (au sens large) . . . et son application': 'Par contraste avec la compétence normative, qui consiste en l'édiction de normes générales et impersonnelles ou décisions individuelles par les organes investis de la fonction législative ou réglementaire, la compétence d'exécution "s'étend généralement comme le pouvoir d'accomplir des actes matériels tels la détention, l'instruction ou le redressement de la violation d'une règle de droit"'.

Separate reference is sometimes made, especially in the civil context, to ‘jurisdiction to adjudicate’,³⁸⁴ or ‘judicial’³⁸⁵ or ‘curial’³⁸⁶ jurisdiction, referring specifically to a municipal court’s competence under international law to adjudge certain matters. But, in the criminal context, the distinction is generally unnecessary. The application of a state’s criminal law by its criminal courts is simply the exercise or actualization of prescription: both amount to an assertion that the law in question is applicable to the relevant conduct.³⁸⁷ As a result, a state’s criminal courts have no greater authority under international law to adjudge conduct by reference to that state’s criminal law³⁸⁸ than has the legislature of the state to prohibit the conduct in the first place. Equally, the trial and, in the event, conviction and sentencing of an individual for conduct prohibited by a state’s criminal law is as much a means of executing or enforcing that law as is the police’s investigation, arrest, charging and prosecution of the individual under it. As such, a state’s criminal courts have no greater authority under international law to execute the state’s criminal law than have the police or other coercive organs and agents of that state: as will be seen below, neither can operate as of right in the territory of another state. In apparent recognition of the foregoing, the respective judges of the ICJ in *Arrest Warrant*, the Court and dissenting judges of the Permanent Court of International Justice (PCIJ) in the *Lotus* case before it, and the bulk of the mainstream European academic

³⁸⁴ See, e.g. *Restatement (Third) of the Foreign Relations Law of the United States* (1987), §§ 401 and 421–433; Council of Europe, Recommendation R (97) 11 on the amended model plan for the classification of documents concerning state practice in the field of public international law, 12 June 1997, Appendix, Part Eight (II); O. Schachter, ‘International Law in Theory and Practice. General Course in Public International Law’, 178 *Hague Recueil (HR)* (1982–V) 9, at 244–249; Y. Dinstein, ‘The Universality Principle and War Crimes’, in M.N. Schmitt and L.C. Green (eds), *The Law of Armed Conflict: Into the Next Millenium* (Newport, RI: Naval War College, 1998) vol. 17, at 30–32.

³⁸⁵ See, e.g. M. Akehurst, ‘Jurisdiction in International Law’, 46 *British Yearbook of International Law* (1972–1973) 145; B. Oxman, ‘Jurisdiction of States’, 3 *Encyclopedia of Public International Law* (1997) 55, at 55; A. Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case’, 13 *European Journal of International Law* (2002) 853, at 858.

³⁸⁶ See, e.g. R. Jennings and A. Watts (eds), *Oppenheim’s International Law. Volume I. Peace* (9th edn, Harlow: Longman, 1992), § 137.

³⁸⁷ See Akehurst, *supra* note 6, at 179: ‘In criminal law legislative jurisdiction and judicial jurisdiction are one and the same.’ See similarly Oxman, *supra* note 6, at 55; F. Berman, ‘Jurisdiction: The State’, in P. Capps, M. Evans and S. Konstadinidis (eds), *Asserting Jurisdiction. International and European Legal Perspectives* (Oxford; Portland OR: Hart, 2003) 3, at 5.

³⁸⁸ Note, in this regard, the seemingly universal practice whereby a state’s criminal courts – in contrast usually to its civil courts – apply the law of that state and no other.

literature³⁸⁹ premise their respective treatments of national criminal jurisdiction on the simple binary distinction between what are, here, termed jurisdiction to prescribe and jurisdiction to enforce. As specifically regards jurisdiction to prescribe, state practice reveals a number of accepted bases or ‘heads’ of jurisdiction,³⁹⁰ pursuant to which, as a matter of general international law, states may³⁹¹ assert the applicability of their criminal law, each of these heads being thought to evidence a sufficient link between the impugned conduct and the interests of the prescribing state. The two heads of jurisdiction unquestionably

³⁸⁹ See, e.g. the approach adopted by F.A. Mann, although Mann (along with others) refers to ‘legislative’, rather than ‘prescriptive’ jurisdiction: see F.A. Mann, ‘The Doctrine of Jurisdiction in International Law’, 111 *HR* (1964–I) 1, reproduced in F.A. Mann, *Studies in International Law* (Oxford: Clarendon Press, 1973) 1; and F.A. Mann, ‘The Doctrine of International Jurisdiction Revisited After 20 Years’, 186 *HR* (1984–II) 9, reproduced in F.A. Mann, *Further Studies in International Law* (Oxford: Clarendon Press, 1990) 1. See, similarly, D.W. Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’, 53 *British Yearbook of International Law* (1982) 1, at 1; V. Lowe, ‘Jurisdiction’, in M.D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003) 329, at 332–333. Combacau and Sur, likewise, distinguish between ‘competence normative’ or ‘competence legislative’, on the one hand, and ‘competence operationnelle’, on the other: see J. Combacau and S. Sur, *Droit International Public* (4th edn, Paris: Montchrestien, 1999), 342 and 351, respectively. Recall also, from *supra* note 4, Daillier and Pellet’s analogous distinction between ‘competence normative’ and ‘competence d’exécution’. A simple binary distinction between what are here called jurisdiction to prescribe and jurisdiction to enforce is also maintained by Kelsen: see H. Kelsen, *Principles of International Law* (2nd edn, New York: Holt, Rinehart and Winston, 1966) (revised and edited by R.W. Tucker), 307–310.

³⁹⁰ These heads are alternatives: a state need only point to one of them as the basis for its assertion of jurisdiction. In this regard, note that a state’s criminal jurisdiction to prescribe in relation to any given conduct is not necessarily exclusive. It is very commonly the case that two or more states enjoy concurrent jurisdiction – that is, prescriptive jurisdiction over the same conduct – each under a different head

³⁹¹ This is not the place to discuss the meaning and present status of the PCIJ’s famous dictum in *Lotus*, at 19, although cf. the rider added by the Court, *ibid.*, at 20, as well as *ibid.*, diss. op. Loder, at 34, and diss. op. Nyholm, at 60–61, along with the approach taken in Harvard Law School Research in International Law, ‘Jurisdiction with Respect to Crime’, 29 *American Journal of International Law Supp.* (1935) 435. See also, far more recently, *Arrest Warrant*, sep. op. Guillaume at § 14, sep. op. Higgins, Kooijmans and Buergenthal at §§ 50–51, and diss. op. Van den Wyngaert at § 51. In the final analysis, it arguably does not matter whether the so-called ‘*Lotus* presumption’, in general or in the specific context of criminal jurisdiction, is correct or accepted in principle, since, in practice, its application need not run counter to the observable situation whereby state assertions of prescriptive criminal jurisdiction are tolerated only if they fall under specific acceptable heads: all that is required is that, instead of characterizing the accepted heads of prescriptive jurisdiction as permissive rules set against a backdrop of a general prohibition, we think of them as pockets of residual presumptive permission in the interstices of specific prohibitions. The only difference – and this might not, in the event, be that great – is the burden of proof. As it is, the Court in *Lotus* summarized its position very generally, stating that ‘all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty’: *Lotus*, at 19. This simple statement is unimpeachable and ‘[w]hatever the underlying conceptual approach, a State must be able to identify a sufficient nexus between itself and the object of its assertion of jurisdiction’: Oxman, *supra* note 6, at 56. On a different note, it is worth stating that, as a matter of general international law (cf. certain treaty obligations), jurisdiction to prescribe is permissive or facultative, not mandatory. Whether or not a state actually asserts a jurisdiction allowed it by international law is a matter for that state.

available to states in respect of all offences are territoriality and, in relation to extraterritorial offences, nationality: that is, a state may criminalize conduct performed on its territory, as well as conduct performed abroad by one of its nationals. In addition, extraterritorial prescriptive jurisdiction over the conduct of non-nationals on the basis of so-called ‘passive personality’ – viz. where the victim of the offence is a national of the prescribing state³⁹² – now appears generally permissible.³⁹³ Extraterritorial prescriptive jurisdiction over the conduct of non-nationals is also permitted, although only in relation to certain offences, under what is known as the ‘protective’ principle (or *competence réelle*): that is, states may assert criminal jurisdiction over offences committed abroad by aliens where the offence is deemed to constitute a threat to some fundamental national interest.³⁹⁴ The assertion of criminal jurisdiction over extraterritorial conduct by aliens on the basis of the ‘effects’ doctrine – viz. where the offence is deemed to exert some deleterious effect within the territory of the prescribing state – remains controversial, if apparently not objectionable in all cases.³⁹⁵ Many states also assert prescriptive criminal jurisdiction over the extraterritorial conduct of non-

³⁹² In the past, passive personality was sometimes subsumed terminologically into the protective principle: see, e.g. *Lotus*, diss. op. Finlay, at 55–58 and diss. op. Moore, at 91–92.

³⁹³ Such jurisdiction was disputed in the past: see, e.g. *Lotus*, diss. op. Loder, at 36, diss. op. Finlay, at 55–58, diss. op. Nyholm, at 62 and diss. op. Moore, at 91–93; see also Harvard Law School Research in International Law, *supra* note 12, at 445 and 579. The Court in *Lotus* reserved its opinion on the existence of the principle: see *Lotus*, at 22–23. But, as noted by Judges Higgins, Kooijmans and Buergenthal, in their joint separate opinion in *Arrest Warrant*, at § 47, ‘[p]assive personality jurisdiction, for so long regarded as controversial, is now reflected . . . in the legislation of various countries . . . and today meets with relatively little opposition, at least so far as a particular category of offences is concerned’. For his part, Judge Rezek asserts that a ‘majority of countries’ give effect to the principle: *Arrest Warrant*, sep. op. Rezek, at § 5. President Guillaume goes so far as to treat passive personality as part of ‘the law as classically formulated’: *Arrest Warrant*, sep. op. Guillaume, at § 4.

³⁹⁴ See, e.g. *Lotus*, at 20 and *ibid*, diss. op. Loder at 35–36; *Arrest Warrant*, sep. op. Guillaume at § 4 and sep. op. Rezek at § 4. In the past, at least, this principle has been less a general rule than the basis on which a few, specific exercises of extraterritorial jurisdiction over non-nationals have been tolerated by states, e.g. the offence of counterfeiting currency or an inchoate conspiracy to assassinate the head of state.

³⁹⁵ The effects doctrine proper is to be distinguished from prescriptive jurisdiction on the basis of so-called ‘objective’ territoriality, out of which it seems to have grown: we speak of the former rather than the latter when no constituent element of the offence takes place within the territory of the prescribing state. The Court in *Lotus* was content simply to note the occasional assertion of such jurisdiction: see *Lotus*, at 23. In the event, extraterritorial prescriptive jurisdiction on the basis of the effects doctrine has proved uncontroversial in relation to certain offences, e.g. inchoate conspiracies to commit murder, to import prohibited drugs, etc. But, to cut a long story short, it has proved highly controversial in other areas, notably in the field of antitrust or competition law, even if today “[e]ffects” or “impact” jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union’ in this area: *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 47.

nationals on a range of other bases thought to evidence a sufficient link with the prescribing state's interests, e.g. on the basis of the offender's residency in that state or his or her service in that state's armed forces. Such assertions have seemingly excited no adverse reaction. Finally, even if the range of such offences is contested, criminal jurisdiction over the extraterritorial conduct of non-nationals also attaches to certain specific offences on the basis of universality – that is, in the absence of any other acceptable prescriptive jurisdictional nexus.³⁹⁶

While jurisdiction to prescribe can be extraterritorial, jurisdiction to enforce is, by way of contrast, strictly territorial. A state may not enforce its criminal law in the territory of another state without that state's consent.³⁹⁷ The territorial character of jurisdiction to enforce is seen most clearly in the impermissibility, as of right, of extraterritorial police powers: the police of one state may not investigate crimes and arrest suspects in the territory of another state without that other state's consent.³⁹⁸ It is also reflected in the judicial sphere: the criminal courts of one state may not, as of right, sit in the territory of another,³⁹⁹ or subpoena witnesses

³⁹⁶ See, e.g. *Arrest Warrant*, sep. op. Guillaume, at §§ 12 and 16 (piracy), sep. op. Koroma, at § 9 (at least piracy, war crimes and crimes against humanity, including the slave trade and genocide), sep. op. Higgins, Kooijmans and Buergenthal, at §§ 61–65 (at least piracy, war crimes and crimes against humanity), and diss. op. Van den Wyngaert, at § 59 (at least war crimes and crimes against humanity, including genocide).

³⁹⁷ See, e.g. *Lotus*, at 18–19; *Arrest Warrant*, sep. op. Guillaume, at § 4, sep. op. Higgins, Kooijmans and Buergenthal, at § 54, and diss. op. Van den Wyngaert, at § 49. General international law admits of only rare exceptions to the territoriality of criminal jurisdiction to enforce, all of them pertaining to armed conflict. First, military forces engaged in armed conflict in the territory of a foreign state are permitted to capture or otherwise take into custody and detain hostile combatants, as well as civilians accompanying regular armed forces, when such persons fall into their power in the course of hostilities. Secondly, a state in belligerent occupation of all or part of the territory of a hostile state is permitted to exercise certain extraterritorial powers of criminal (prescription and) enforcement over the occupied territory, in accordance with rules now codified in Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287, Arts 64–77. Finally, an occupying power is permitted, under certain conditions, to resort to preventive detention, in accordance with Geneva IV, Art. 78.

³⁹⁸ Examples of consent to the extraterritorial exercise of police powers are Arts 40 and 41, providing for limited and conditional cross-border powers of police investigation and of 'hot pursuit', respectively, of the Convention implementing the Schengen Agreement of 14 June 1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 22 September 2000, OJ 2000 L239, 0019–0062; see also the provisions typical of status of forces agreements (SOFAs), e.g. Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 June 1951, UKTS No. 3 (1955), Cmd 9363, Art. VII.

³⁹⁹ An example of consent to the extraterritorial sitting of a criminal court is the Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland concerning a Scottish Trial in the Netherlands, 24 August 1998, UKTS No. 43

or documents, or take sworn affidavit evidence abroad. The upshot of this is that a state's jurisdiction to prescribe its criminal law and its jurisdiction to enforce it do not always go hand in hand. It is often the case that international law permits a state to assert the applicability of its criminal law to given conduct but, because the author of the conduct is abroad, not to enforce it. At the same time, general international law does not prohibit the issuance of an arrest warrant for a suspect or the trial of an accused in *absentia*, the legality of both being a question for the municipal law of each state.⁴⁰⁰ Nor does the territorial character of criminal enforcement jurisdiction prevent the prescribing state from requesting the extradition of a suspect, accused or convict from the territory of a state in which he or she is present, or from requesting other police or judicial assistance from another state.

Jurisdiction to prescribe and jurisdiction to enforce are logically independent of each other. The lawfulness of a state's enforcement of its criminal law in any given case has no bearing on the lawfulness of that law's asserted scope of application in the first place, and vice versa. For example, imagine that a criminal court in the state of Hernia tries and convicts a national of the state of Dyspepsia under a Hernian statute outlawing whistling in Dyspepsia, the accused having been arrested while on holiday in Hernia. Hernia is exercising an exorbitant prescriptive jurisdiction, but no rule of international law governing jurisdiction to enforce has been breached. Conversely, imagine that Dyspepsian police arrest, in Hernian territory, a Dyspepsian national, charged with murder in Dyspepsia. This constitutes an exorbitant exercise by Dyspepsia of jurisdiction to enforce, even if it enjoys jurisdiction under international law to criminalize the conduct in question.

(1999). See also, more recently, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of New Zealand concerning Trials under Pitcairn Law in New Zealand and Related Matters, 11 October 2002, Cmd 5745.

⁴⁰⁰ See, e.g. *Arrest Warrant*, *sup. op.* Higgins, Kooijmans and Buergenthal, at § 56. As regards the trial of the accused, the jurisdiction of the criminal courts in the common-law tradition is, as a matter of municipal law, generally *in personam*: with a few exceptions, the presence of the accused in the court is a precondition to his or her trial. By contrast, many civil-law states permit trial *in absentia* under certain conditions.

At the same time, while *jurisdiction* to prescribe and *jurisdiction* to enforce are mutually distinct, the act of prescription and the act of enforcement are, in practice, intertwined. A state's assertion of the applicability of its criminal law to given conduct is actualized, as it were, when it is sought to be enforced in a given case. Nonetheless, the act of prescription can still be said to take place when the prohibition in question is promulgated, the conduct prohibited being, at that point, hypothetical (that is, paradigmatic murder, paradigmatic robbery and so on). It might well be that the question of when prescription occurs is distinct from the question of when state responsibility for the arrogation of exorbitant prescriptive jurisdiction can be said to be engaged, although the latter might, in turn, depend upon the way in which responsibility is invoked.⁴⁰¹ But, as far as prescription itself is concerned, this must be said to occur when jurisdiction is asserted, rather than exercised.⁴⁰² If this were not the case, then the prescription of the prohibition in question – in other words, the proscription of the relevant conduct – would take place after the commission of the prohibited conduct and, as such, would amount to *ex post facto* criminalization – a phenomenon abhorred

⁴⁰¹ It would seem that, vis-a-vis an injured state within the meaning of Art. 42 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Res. 56/83, 12 December 2001, responsibility arises only when prescriptive jurisdiction is exercised, i.e. when it is enforced, e.g. when the Dyspepsian national is arrested by the Hernian authorities on suspicion of having violated Hernian law by whistling in Dyspepsia. See also L. Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (Oxford, New York: Oxford University Press, 2003) 25. On the other hand, it might be the case that a so-called 'interested' state acting under Art. 48 of the ILC's Articles could invoke the responsibility of Hernia for its mere promulgation of the offensive law, and would be entitled to demand its repeal, even if it were never enforced. Such questions are beyond the scope of this article.

⁴⁰² The situation is more complex when a state's assertion of the applicability of its criminal law to given conduct takes place by way of judicial ruling. As mentioned *supra* note 3, this can happen in one of two ways. In the vast majority of cases in both civilian and common-law systems, such a ruling will take the form of an expansive interpretation by the court of the ambiguous jurisdictional scope of a given statute. While the practical effect of such a ruling is that prescription occurs only at the moment of its exercise, the formal legal characterization of the situation is that the statute in question has always had the jurisdictional scope ascribed to it by the court; as such, prescription can still be said, at least in formal terms, to have occurred when the statute came into force. In some common-law countries, however, the jurisdictional scope of at least certain crimes is still the creation solely of the judge-made law, the upshot being that a judicial ruling can (leaving aside certain objections) extend the jurisdictional scope of a crime without reference to statute. Here, recourse must be had to the traditional common-law fiction that a judicial ruling merely 'discovers' what the common law has always been, the result being that, again at least formally, prescription takes place not at the moment of enforcement but when the common law is said, by historical fiction, to have emerged. In both instances, the reality is that serious questions of retroactivity arise: although the prohibition itself might have existed at the time of the accused's conduct, the application of the prohibition to the accused might not have been ascertainable.

by the world's major legal traditions and contrary to international human-rights law.⁴⁰³

This last point helps to answer the question of when the relevant prescriptive jurisdictional nexus – be it territoriality, the nationality or residency of the offender, the nationality of the victim, or the offender's service in the armed forces of the prescribing state – must exist in a given case; and the answer is that the nexus relied on to ground prescriptive jurisdiction over given conduct must exist at the time at which the conduct is performed. This is obvious in relation to territoriality. The assertion of prescriptive jurisdiction over an offence that takes place abroad cannot be founded on territoriality simply because the offender subsequently enters the territory of the prescribing state: regardless of how it is enforced, an assertion of prescriptive jurisdiction over conduct taking place outside the territory of the prescribing state is an assertion of extraterritorial jurisdiction, for which an alternative legal justification must be found. As Judge Loder noted in his dissenting opinion in *Lotus*, speaking specifically of jurisdiction to prescribe on the basis of territoriality:

. . . a law [cannot] extend in the territory of the State enacting it to an offence committed by a foreigner abroad should the foreigner happen to be in this territory after the commission of the offence, because the guilty act has not been committed within the area subject to the jurisdiction of that State and the *subsequent presence of the guilty person* cannot have the effect of *extending the jurisdiction of the State*.⁴⁰⁴

Similarly, in respect of nationality, the offender must be a national of the prescribing state at the moment at which he or she commits the offence. The same applies, *mutatis mutandis*, to prescriptive jurisdiction on the basis of

⁴⁰³ See Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948, Art. 11(2); International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 15(1); European Convention on Human Rights, 4 November 1950, ETS No. 5, Art. 7(1); American Convention on Human Rights, 22 November 1969, OASTS No. 36, Art. 9; African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5, Art. 7(2).

⁴⁰⁴ *Lotus*, diss. op. Loder, at 35 (original emphasis).

residency, passive personality and service in the armed forces of the prescribing state.⁴⁰⁵ The reason for this, as alluded to above, is the cardinal principle of the rule of law expressed in the maxim *nullum crimen nulla poena sine lege*. The exercise of prescriptive jurisdiction on the basis of a jurisdictional nexus established subsequent to the commission of the offence is a form of *ex post facto* criminalization and, therefore, repugnant, in that a substantive national criminal prohibition and its attendant punishment – and not merely a national procedural competence – become applicable to the accused only after the performance of the impugned conduct.⁴⁰⁶

This last point is worth emphasizing: the exercise by a state of prescriptive jurisdiction in reliance on a jurisdictional nexus not satisfied until after the commission of the ‘offence’ means that, at the moment of commission, the ‘offender’ is not prohibited by the law of that state from performing the relevant act; as such, his or her subsequent conviction and punishment for that act under the law of the state in question are violations of the principle of legality. This is especially significant in relation to prescriptive jurisdiction asserted on the basis of a nationality (or, equally, residency) acquired after the impugned act. True, a number of states provide for jurisdiction over certain strictly municipal offences⁴⁰⁷

⁴⁰⁵ The question has less chance of arising in relation to the protective principle and the effects doctrine, where the requisite prescriptive jurisdictional nexus – respectively, the threat posed by the relevant conduct to a fundamental interest of the prescribing state and the effect of the relevant conduct within its territory – is, in practice, simply deemed to exist in relation to certain offences such as counterfeiting. But consider the situation where the prescribing state itself did not exist at the time of the commission of the offence; and query the statements in this regard in *Attorney-General of Israel v Eichmann*, 36 *International Law Reports (ILR)* 5, at 49–57, especially §§ 36–38 (1961, Dist. Ct Jerusalem) and 36 *ILR* 5, at 304 (1962, Sup. Ct Israel).

⁴⁰⁶ That said, it might be countered that the considerations of natural justice underpinning the principle of legality are less compelling in circumstances where individuals have the choice of whether to render themselves liable to punishment for past conduct by subsequently adopting a given nationality or residency, or by subsequently joining the armed forces of a given state. This rebuttal, however, is unsatisfactory when it comes to jurisdiction on the basis of passive personality in cases where the victim acquires the relevant nationality after the commission of the offence. In such cases, the offender is obviously denied fair warning.

⁴⁰⁷ It is crucial to note that different considerations apply to crimes under general international law, as specifically considered *infra*. In short, the principle of legality is not violated in cases of municipal retroactivity where the impugned conduct constituted an offence under international law at the time of its commission: see, e.g. Universal Declaration, Art. 11(2); ICCPR, Art. 15(1); ECHR, Art. 7(1), as consonant with customary international law. This is highly relevant to the exercise of universal jurisdiction over crimes under general international law, especially by means of subsequent nationality or subsequent residency jurisdiction, as also discussed *infra*.

on the basis of nationality acquired by the offender subsequent to the commission of the offence.⁴⁰⁸ But, this, nonetheless, violates the prohibition on the retroactive application of criminal laws,⁴⁰⁹ and cannot be said to be a valid exercise of nationality jurisdiction in the eyes of public international law,⁴¹⁰ even if it has elicited no great reaction from states who do not assert it. The lack of adverse response does not necessarily denote acquiescence. For one thing, while such provisions are on the books, it seems that they have only very rarely formed the basis of prosecutions; as such, there has been little opportunity for the occasioning of injury to other states,⁴¹¹ and, hence, for protest. Moreover, there is no indication of the *opinio juris* accompanying the apparent silence, and the most likely explanation for it relates to the admissibility of claims under the law of diplomatic protection: the offender's change of nationality after the commission of the offence implicates the rule on the continuous nationality of claims; alternatively, the offender's later assumption of an additional nationality implicates questions of dual nationality. Whatever other subjective belief as might exist is just as likely political as legal.⁴¹²

6.3. Clarifying Universal Jurisdiction

A. Basic Definition

⁴⁰⁸ See, e.g. Penal Code (France), Art. 113–6. See also the sources cited in Z. Deen-Racsmány, 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court', 95 *American Journal of International Law (AJIL)* (2001) 606, at 614.

⁴⁰⁹ See also L. Sarkar, 'The Proper Law of Crime in International Law', 11 *International and Comparative Law Quarterly (ICLQ)* (1962) 446, at 459. The question is floated but left open by Deen-Racsmány, *supra* note 29, at 614–615, especially note 61, although she does suggest *contra* that '[n]ationality either at the time of prosecution or at the time of the commission of the crime should be sufficient for jurisdiction' (*ibid.*, at 615).

⁴¹⁰ Cf., *contra*, Harvard Law School Research in International Law, *supra* note 12, at 531–532, and the sources referred to therein, even if the authors concede that such jurisdiction is 'possibly a little difficult to justify theoretically' (*ibid.*, at 532).

⁴¹¹ Recall *supra* note 22.

⁴¹² See, e.g. *Lotus*, diss. op. Altamira, at 98.

It comes as something of a surprise that none of the judges in *Arrest Warrant* explicitly posits a definition of universal jurisdiction, despite the concept's centrality to the case. In fact, Judge ad hoc Van den Wyngaert suggests, in her dissenting opinion, that '[t]here is no generally accepted definition of universal jurisdiction in conventional or customary international law',⁴¹³ stating that '[m]any views exist as to its legal meaning'⁴¹⁴ and that 'uncertainties . . . may exist concerning the definition [of the concept]'.⁴¹⁵

In response to Judge ad hoc Van den Wyngaert, one might fairly question whether treaty or custom could be expected to provide such a definition, rather than just permissive or prohibitive rules regarding a phenomenon defined doctrinally. One might query, also, the genuineness or seriousness of the alleged debate over the meaning of universal jurisdiction. And, one might, with reason, point out that the absence of a customary or conventional definition and the supposed plurality of doctrinal definitions do not mean that no single soundest definition of universal jurisdiction cannot be given.

It would seem sufficiently well agreed that universal jurisdiction amounts to the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct. (It should again be stressed, in this light, that the term 'universal jurisdiction' is shorthand for 'universal jurisdiction *to prescribe*' or 'universal *prescriptive* jurisdiction' and that the point by reference to which one characterizes the head of prescriptive jurisdiction relied on in a given case is the moment of commission of the putative offence.) In positive and slightly pedantic terms, universal jurisdiction can be defined as prescriptive jurisdiction over offences committed abroad by persons who, at the time of commission, are non-resident aliens, where such offences are not deemed to constitute threats to the fundamental interests of the prescribing

⁴¹³ *Arrest Warrant*, diss. op. Van den Wyngaert, at § 44.

⁴¹⁴ *Ibid.*, at § 45.

⁴¹⁵ *Ibid.*, at § 46.

state or, in appropriate cases, to give rise to effects within its territory.⁴¹⁶ This positive definition is, needless to say, a mouthful, and universal jurisdiction is probably more usefully defined in opposition to what it is not. Indeed, Ascensio observes that universal jurisdiction 'is usually defined negatively, as a ground of jurisdiction which does not require any link or *nexus* with the elected *forum*'.⁴¹⁷ As stated by de la Pradelle:

La compétence penale d'une juridiction nationale est dite 'universelle' quand . . . un tribunal que ne designe aucun des criteres ordinairement retenus – ni la nationalite d'une victime ou d'un auteur presume, ni la localisation d'un element constitutif d'une infraction, ni l'atteinte portee aux interets fondamentaux de l'Etat – peut, cependant, connaitre d'actes accomplis par des etrangers, a l'etranger ou dans un espace echappant a toute souverainete.⁴¹⁸

Similarly, Reydam's states:

Negatively defined, [universal jurisdiction] means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit.⁴¹⁹

(By 'nationality', Reydam's means both 'the nationality of the perpetrator, and the nationality of the victim'.⁴²⁰) Meron, likewise, defines universal jurisdiction as

⁴¹⁶ See, similarly, Reydam's, *supra* note 22, at 5: 'Positively defined, a State exercises universal jurisdiction when it seeks to punish conduct that is totally foreign, ie conduct by and against foreigners, outside its territory and its extensions, and not justified by the need to protect a narrow self-interest.'

⁴¹⁷ H. Ascensio, 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*', 1 *Journal of International Criminal Justice (JICJ)* (2003) 690, at 699. See also, in a similarly negative formulation, M. Henzelin, *Le principe de l'universalite en droit penal international* (Basel/Geneva/Munich: Helbing and Lichtenhahn; Bruxelles: Bruylant, 2000) 1 and 29, § 72.

⁴¹⁸ G. de la Pradelle, 'La compétence universelle', in H. Ascensio, E. Decaux and A. Pellet (eds), *Droit International Penal* (Paris: Pedone, 2000) 905, at § 1. See also B. Stern, 'A Propos de la Compétence Universelle . . .', in E. Yakpo and T. Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague: Kluwer, 1999) 735, at 737 ('une compétence universelle . . . signifie que l'Etat a le droit d'exercer une compétence pour certains actes qui ne sont pas produits sur son territoire, et a l'égard desquels il ne serait pas normalement compétent').

⁴¹⁹ Reydam's, *supra* note 22, at 5.

existing when 'states that have no territorial or nationality (active or passive) or "protective principle" links' are permitted, by international law, 'to prosecute those who commit [offences]'.⁴²¹ Paragraph 404 of the *Restatement (Third) of the Foreign Relations Law of the United States* provides an analogous definition.⁴²² Other definitions commonly offered are essentially identical, even if they often omit reference to less common heads of prescriptive jurisdiction, such as the protective principle and passive personality.⁴²³ All conceive of universal jurisdiction as permitting a state to deem given conduct an offence against its law, 'regardless of any nexus the state may have with the offence, the offender, or the victim'.⁴²⁴

By way of aside, note that universal jurisdiction is often said to mean that 'any' state or 'every' state is permitted to criminalize the conduct in question.⁴²⁵ While the gist of such statements is clear and obviously correct, the use of words like 'any' and 'every' can be unintentionally misleading, in so far as it might be mistaken to suggest that universal jurisdiction can never be grounded in treaty

⁴²⁰ *Ibid.*

⁴²¹ T. Meron, 'International Criminalization of Internal Atrocities', 89 *AJIL* (1995) 554, at 568. See, similarly, Schachter, *supra* note 5, at 262.

⁴²² See also comment (a) to § 404 of the *Restatement (Third)*, *supra* note 5.

⁴²³ See, e.g. L.C. Green, 'International Crimes and the Legal Process', 29 *ICLQ* (1980) 567, at 568, as endorsed by Brennan J. of the High Court of Australia in *Polyukhovich v Commonwealth of Australia* (1991) 91 *ILR* 1, at 40; G. Triggs, 'Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?', 16 *Melbourne University Law Review* (1987) 382, at 389, as endorsed by Cory J. of the Supreme Court of Canada in *R. v Finta* (1994) 104 *ILR* 284, at 353; K.C. Randall, 'Universal Jurisdiction Under International Law', 66 *Texas Law Review* (1988) 785, at 788; R. Higgins, *Problems and Process. International Law and How We Use It* (Oxford: Clarendon Press, 1994) 57; Combacau and Sur, *supra* note 10, at 350; A. Cassese, *International Law* (Oxford: Oxford University Press, 2001) 261; W.A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001) 60; G. Danilenko, 'ICC Statute and Third States', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary. Volume II* (Oxford: Oxford University Press, 2002) 1871, at 1878; G.P. Fletcher, 'Against Universal Jurisdiction', 1 *JICJ* (2003) 580, at 582.

⁴²⁴ S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd edn, Oxford: Oxford University Press, 2001) 161. See, similarly, Princeton Principles on Universal Jurisdiction, available online at <http://www.princeton.edu/lapa/univjur.pdf>, Principle 1(1) (visited 18 May 2004).

⁴²⁵ See, e.g. Green, *supra* note 44, at 568; Bowett, *supra* note 10, at 11; Randall, *supra* note 44, at 788; Oxman, *supra* note 6, at 58; Dinstein, *supra* note 5, at 18; Combacau and Sur, *supra* note 10, at 350; Stern, *supra* note 39, at 735; Cassese, *supra* note 44, at 261; Schabas, *supra* note 44, at 60; Danilenko, *supra* note 44, at 1878; B. Conforti, *Diritto Internazionale* (6th edn, Naples: Editoriale Scientifica, 2002), § 24.2.

law, circumscribed as it is by the *pacta tertiis* principle. Such a misapprehension would seem to underpin Higgins' heterodox characterization (in a non-judicial capacity) of a certain provision common to many international criminal conventions and generally considered to mandate universal jurisdiction.⁴²⁶ She is not, it must be said, alone. Cameron takes a similar line⁴²⁷ and Cassese states:

[A]s rightly pointed out by R. Higgins, these treaties do not provide for universal jurisdiction proper, for only the contracting states are entitled to exercise extraterritorial jurisdiction over offenders on their territory. In addition, it may be contended that such jurisdiction does not extend to offences committed by nationals of states *not parties*, unless the crime (1) is indisputably prohibited by customary international law . . . or (2) the national of the non-contracting state engages in prohibited conduct in the territory of a state party, or against nationals of that state.⁴²⁸

Cassese's substantive points are sound, but his (and the others') implicit definition of 'universal jurisdiction proper' is open to question. The jurisdiction mandated by the relevant treaty provision is, in fact, universal jurisdiction – that is, prescriptive jurisdiction in the absence of any other recognized jurisdictional nexus.

B. 'Universal Jurisdiction In Absentia'

1. President Guillaume, Judge Ranjeva and Judge Rezek in Arrest Warrant

The relevant aspect of *Arrest Warrant* that is most open to question is several judges' treatment of what they call 'universal jurisdiction *in absentia*', which they

⁴²⁶ See Higgins, *supra* note 44, at 63–65, referring to some of the provisions cited *infra*, note 51.

⁴²⁷ See I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot: Dartmouth, 1994), 80.

⁴²⁸ A. Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *JICJ* (2003) 589, at 594 (original emphasis, citation omitted). On the exercise of treaty-based universal jurisdiction over the nationals of non-party states, cf. *contra* M.P. Scharf, 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States', 35 *New England Law Review* (2001) 363.

posit as some sort of undisaggregated jurisdictional category. For example, President Guillaume- speaking of the jurisdictional provision common to many international criminal conventions, whereby each State Party is obliged to ‘take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory . . . ’,⁴²⁹ without any requirement that the offence should take place on the territory of that state or that the alleged offender or victim should be one of its nationals – notes:

[N]one of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law.⁴³⁰

Judge Ranjeva’s use of the term and his reasoning are markedly similar.⁴³¹ What is more, both judges, along with Judge Rezek, talk consistently of so-called universal jurisdiction *in absentia* as if it were even less tolerable than universal jurisdiction *per se*.⁴³² President Guillaume, after observing that states ‘may

⁴²⁹ *Arrest Warrant*, sep. op. Guillaume, at §§ 7–8. Provisions to this effect are found in Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970 (‘Hague Convention’), 860 UNTS 1971, Art. 4(2); Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aircraft, 23 September 1971 (‘Montreal Convention’), 974 UNTS 177, Art. 5(2); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, 1035 UNTS 167, Art. 3(2); Convention against the Taking of Hostages, 17 December 1979, 1316 UNTS 205, Art. 5(2); Convention on the Physical Protection of Nuclear Material, 3 March 1980, 1456 UNTS 124, Art. 8(2); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 112, Art. 5(2); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988 (‘Rome Convention’), 1678 UNTS 221, Art. 6(4); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988 (‘Rome Protocol’), 1678 UNTS 304, Art. 3(4); Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, UN Treaty Reg. No. 37789, Art. 9(2); Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 UNTS 363, Art. 10(4); Convention for the Suppression of Terrorist Bombings, 15 December 1997, UN Treaty Reg. No. 37517, Art. 6(4); Second Protocol to the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, reproduced in 38 *ILM* (1999) 769, Art. 16(1)(c); Convention for the Suppression of the Financing of Terrorism, 9 December 1999, UN Treaty Reg. No. 38349, Art. 7(4); Convention against Transnational Organized Crime, 15 November 2000, UN Treaty Reg. No. 39574, Art. 15(4).

⁴³⁰ *Arrest Warrant*, sep. op. Guillaume, at § 9; see also *ibid.*, at § 12.

⁴³¹ See *Arrest Warrant*, dec. Ranjeva, at § 7.

⁴³² As regards universal jurisdiction *per se*, President Guillaume states explicitly that it is not recognized by general international law except in relation to piracy: *Arrest Warrant*, sep. op. Guillaume, at § 16. Judge

exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory', concludes:

But apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.⁴³³

Judge Ranjeva, noting by way of introduction that 'la presente declaration portera-t-elle sur l'interpretation que la Belgique donne de la competence universelle',⁴³⁴ states:

5. La legislation belge qui institue la competence universelle *in absentia* pour les violations graves du droit international humanitaire a consacre l'interpretation la plus extensive de cette competence L'innovation de la loi belge reside dans la possibilite de l'exercice de la competence universelle en l'absence de tout lien de la Belgique avec l'objet de l'infraction, la personne de l'auteur presume de l'infraction ou enfin le territoire pertinent. Mais apres les tragiques evenements survenus en Yougoslavie et au Rwanda, plusieurs Etats ont invoque la competence universelle pour engager des poursuites contre des auteurs presumes de crimes de droit humanitaire; cependant, a la difference du cas de M. Yerodia Ndombasi, les personnes impliquees avaient auparavant fait l'objet d'une procedure ou d'un acte d'arrestation, c'est-a-dire qu'un lien de connexion territoriale existait au prealable. 6. En droit international, la même consideration liee au lien de connexite *ratione loci* est également exigee pour l'exercice de la competence universelle . . .

Ranjeva, while taking the view that 'universal jurisdiction *in absentia*' is impermissible (*Arrest Warrant*, dec. Ranjeva, at §§ 8–12), is silent on the status under general international law of universal jurisdiction over offenders subsequently present in the territory of the prescribing state. Judge Rezek rejects, as a matter of general international law, the attachment of universal jurisdiction to the war crimes and crimes against humanity at issue in the case before the Court, both in principle as well as when enforced *in absentia*: *Arrest Warrant*, sep. op. Rezek, at § 10.

⁴³³ *Arrest Warrant*, sep. op. Guillaume, at § 16. Reference by President Guillaume to 'universal jurisdiction *in absentia*' is also found *ibid.*, at §§ 13 and 17.

⁴³⁴ *Arrest Warrant*, dec. Ranjeva, at § 3.

Judge Rezek declares:

L'activisme qui pourrait mener un Etat a rechercher hors de son territoire, par la voie d'une demande d'extradition ou d'un mandat d'arret international, une personne qui aurait ete accusee de crimes definis en termes de droit des gens, mais *sans aucune circonstance de rattachement au for*, n'est aucunement autorise par le droit international en son etat actuel . . .⁴³⁵

He concludes:

[L]e for interne de la Belgique n'est pas competent, dans les circonstances de l'espece, pour l'action penale, faute d'une base de competence autre que le seul principe de la competence universelle et faute, a l'appui de celui-ci, de la presence de la personne accusee sur le territoire belge, qu'il ne serait pas legitime de forcer a comparaitre.⁴³⁶

For her part, Judge ad hoc Van den Wyngaert, while holding *contra* that 'universal jurisdiction *in absentia*' is not prohibited by conventional or customary international law,⁴³⁷ also tends to treat it as a distinct head of jurisdiction, the lawfulness of which is to be proved in its own right;⁴³⁸ but close reading suggests that this is probably just a function of misplaced emphasis.

It should be noted that the approach taken by President Guillaume and Judges Ranjeva and Rezek is not without resonance in the academic literature. Reydam's uses the term 'universal jurisdiction *in absentia*',⁴³⁹

⁴³⁵ *Arrest Warrant*, sep. op. Rezek, at § 6 (original emphasis).

⁴³⁶ *Ibid.*, at § 10.

⁴³⁷ See *Arrest Warrant*, diss. op. Van den Wyngaert, at §§ 54–55 and 58.

⁴³⁸ See *ibid.*, at §§ 52–58.

⁴³⁹ See Reydam's, *supra* note 22, at 55, 74, 88–89, 156, 177, 222, 224, 225 and 227.

and treats it as a form of jurisdiction whose lawfulness is to be considered in its own right – that is, as distinct from universal jurisdiction *per se*.⁴⁴⁰ In a related vein are the various doctrinal writings summarized by Reydam's,⁴⁴¹ where what the author terms the 'co-operative general universality principle' and the 'co-operative limited universality principle' are predicated on the presence of the offender, while the so-called 'unilateral limited universality principle' states that '*any* State may unilaterally launch an investigation, even *in absentia*'.⁴⁴² Similarly, Cassese states that the principle of universality: . . .

has been upheld in two different versions. According to the most widespread version, only the State where the accused is in custody can prosecute him or her (so-called *forum deprehensionis*, or jurisdiction of the place where the accused is apprehended) . . . Under a different version of the universality principle, a State may prosecute persons accused of international crimes regardless . . . of whether or not the accused is in custody in the forum State.⁴⁴³

Elsewhere, he distinguishes between 'conditional' universal jurisdiction and 'absolute' universal jurisdiction.⁴⁴⁴

2. Discussion

The practice of states in this regard – sparse and ambivalent, to date – does not point conclusively to the general recognition of so-called universal jurisdiction *in absentia* as a distinct category of jurisdiction whose lawfulness is to be established in its own right. As such, the question can only be approached from first principles. In this light, the

⁴⁴⁰ See, e.g. *ibid.*, at 224.

⁴⁴¹ See *ibid.*, at 29–42.

⁴⁴² *Ibid.*, at 38 (original emphasis).

⁴⁴³ Cassese, *supra* note 44, at 261.

⁴⁴⁴ See A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), at 284–291.

approach adopted by President Guillaume and Judges Ranjeva and Rezek is not logically compelling. It conflates a state's jurisdiction to prescribe its criminal law with the manner of that law's enforcement.

As a manifestation of 'jurisdiction' in some wholly notional unitary sense, there can be no such thing as 'universal jurisdiction *in absentia*'. Universal jurisdiction is a manifestation of jurisdiction to prescribe. Like all heads of jurisdiction to prescribe, it might be that it is exercised in a given case with the accused present in the court, consequent upon his or her arrest in the territory of the prosecuting state, pursuant to a warrant issued while he or she was present in that territory. Or, it might be exercised *in personam*, but consequent upon the accused's arrest in and extradition from a foreign state, pursuant to a warrant issued while he or she was abroad or, equally, while he or she was in the territory of the prosecuting state, having since absconded. Alternatively, it might be that it is exercised without the accused present in the court, pursuant to an outstanding warrant, issued while he or she was abroad. Or, it might be exercised *in absentia* but pursuant to an outstanding warrant, issued while a subsequently absconding accused was present in the prosecuting state. The fact is that prescription is logically independent of enforcement. On the one hand, there is universal jurisdiction, a head of prescriptive jurisdiction alongside territoriality, nationality, passive personality and so on. On the other hand, there is enforcement *in absentia*, just as there is enforcement *in personam*.

In turn, since prescription is logically distinct from enforcement, the legality of the latter can in no way affect the legality of the former, at least as a matter of reason. Universal jurisdiction to prescribe is either lawful or it is not. The issuance of a warrant *in absentia* and trial *in absentia* is either lawful or it is not. And, as far as international law goes, these last two *are*, in fact, lawful, in a reflection of the position classically adopted by the civil-law tradition. As rightly noted by Judges Higgins, Kooijmans and Buergenthal:

... [s]ome jurisdictions provide for trial *in absentia*; others do not. If it is said that a person must be within the jurisdiction at the time of the trial

itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law.⁴⁴⁵

In short, as a matter of international law, if universal jurisdiction is permissible, then its exercise *in absentia* is logically permissible also. Whether it is desirable is, needless to say, a separate question.

Of course, logic and the *opinio juris* of states do not always go hand in hand, and it is always open to states to indicate unambiguously that the international lawfulness of universal jurisdiction does, in fact, depend upon the presence of the offender. But, 'the great majority of the interested states'⁴⁴⁶ have not done so, to date.

If the novel term 'universal jurisdiction *in absentia*' must be used at all, it can surely only be as shorthand (and potentially confusing shorthand, at that) for the combined manifestation in a given case of two distinct aspects of national criminal jurisdiction, namely the enforcement *in absentia* of universal prescriptive jurisdiction. If one is to talk, however, of 'universal jurisdiction *in absentia*', then one might as well talk also of territorial jurisdiction *in absentia*, nationality jurisdiction *in absentia*, passive personality jurisdiction *in absentia*, and so on. But no one does.

As for President Guillaume's more specific conclusion – based on the classic treaty undertaking by each state party to 'take such measures as may be necessary to establish its jurisdiction over the offences [in question] in cases where the alleged offender is present in its territory . . .' – that the exercise *in absentia* of universal jurisdiction 'is unknown to international conventional law'⁴⁴⁷ (a view echoed by Judge Ranjeva⁴⁴⁸), this confuses what is mandatory with what

⁴⁴⁵ See *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 56.

⁴⁴⁶ *North Sea Continental Shelf Cases* (FRG/Denmark; FRG/Netherlands), *ICJ Reports* (1969) 3, at 229 (diss. op. Lachs).

⁴⁴⁷ *Arrest Warrant*, sep. op. Guillaume, at § 9.

⁴⁴⁸ *Arrest Warrant*, dec. Ranjeva, at § 7.

is permissible, as pointed out by Judges Higgins, Kooijmans and Buergenthal.⁴⁴⁹ It is clear that the territorial precondition to the exercise of the mandatory universal jurisdiction envisaged in such treaty provisions is designed to take account of the general unavailability of trial *in absentia* among states of the common-law tradition. A conventional *obligation* to provide for the exercise of universal jurisdiction *in absentia* would prevent these states from being able to ratify the conventions in question. In this light, the territorial precondition serves as a universally acceptable lowest common denominator, designed to encourage maximum participation in these treaties.⁴⁵⁰ Moreover, as observed by Judge ad hoc Van den Wyngaert, most of the international criminal conventions which contain this provision also embody a provision to the effect that the convention 'does not exclude any criminal jurisdiction exercised in accordance with national law'.⁴⁵¹ It is also worth recalling that the mandatory universal jurisdiction provision in question is accompanied, in every single instance, by an *aut dedere aut judicare* provision;⁴⁵² and, as remarked by Judges Higgins, Kooijmans and Buergenthal:

. . . [t]here cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are

⁴⁴⁹ *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 57.

⁴⁵⁰ See also Ascensio, *supra* note 38, at 700 (original emphasis): 'The presence of the accused on the territory of the prosecuting state, a prerequisite for the implementation of the universal jurisdiction doctrine in many domestic legal systems, is not a link in the sense of a basis of jurisdiction, but only a *procedural condition for the exercise* of universal jurisdiction, usually required for practical reasons. . . . Some international conventions do mention it, in order to set up a minimum obligation for states to implement universal jurisdiction.'

⁴⁵¹ *Arrest Warrant*, diss. op. Van den Wyngaert, at § 61. See, in this regard, Hague Convention, Art. 4(3); Montreal Convention, Art. 5(3); Internationally Protected Persons Convention, Art. 3(3); Hostages Convention, Art. 5(3); Nuclear Material Convention, Art. 8(3); Torture Convention, Art. 5(3); Rome Convention, Art. 6(4); Rome Protocol, Art. 3(5); Illicit Trafficking Convention, Art. 4(3); Mercenaries Convention, Art. 9(3); UN and Associated Personnel Convention, Art. 10(5); Terrorist Bombings Convention, Art. 6(5); Second Hague Protocol, Art. 16(2); Financing of Terrorism Convention, Art. 7(6); Organized Crime Convention, Art. 15(6).

⁴⁵² See Hague Convention, Art. 7; Montreal Convention, Art. 7; Internationally Protected Persons Convention, Art. 7; Hostages Convention, Art. 8(1); Nuclear Material Convention, Art. 10; Torture Convention, Art. 7(1) and (2); Rome Convention, Art. 10(1); Mercenaries Convention, Art. 12; UN and Associated Personnel Convention, Art. 14; Terrorist Bombings Convention, Art. 8; Second Hague Protocol, Art. 17(1); Financing of Terrorism Convention, Art. 10(1); Organised Crime Convention, Art. 16 (10).

critical for the obligatory exercise of *aut dedere aut prosecute* jurisdiction, but cannot be interpreted *a contrario* so as to exclude a voluntary exercise of a universal jurisdiction.⁴⁵³

In addition, it is not clear how these treaty provisions could have a bearing either way on the position of ‘universal jurisdiction *in absentia*’ under *general* international law.

There is an intriguing postscript to all of this. In the version of *Arrest Warrant* originally made available on the ICJ website,⁴⁵⁴ the dissenting opinion of Judge Rezek contained an additional paragraph (a paragraph 8) when compared with the version now available electronically. In this excised paragraph, Judge Rezek distinguishes the case before the Court from the request made by Spain ‘*in absentia*’, as it were, for the extradition by the United Kingdom of Senator Augusto Pinochet for crimes committed in Chile against Spanish nationals – a request that Judge Rezek considers internationally lawful. In a further conflation of jurisdiction to prescribe and jurisdiction to enforce, Judge Rezek concludes:

. . . et surtout . . . la competence de la justice espagnole avait pour fondement le principe de la nationalite passive, qui peut justifier – bien que ce ne soit pas le cas de la totalite, peut-etre meme pas d’une majorite d’Etats – l’engagement de l’action penale *in absentia*, donnant lieu de ce chef a l’emission d’un mandat d’arret international et a la demande d’extradition. The reason for the paragraph’s excision is a matter of surmise.

C. ‘Classical’ Universal Jurisdiction, ‘True Universality’, Universal Jurisdiction ‘Properly So Called’, ‘Pure’ Universal Jurisdiction, etc.

1. Judges Higgins, Kooijmans and Buergenthal in Arrest Warrant

⁴⁵³ *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 57 (original emphasis).

⁴⁵⁴ Copy on file with author.

Although recognizing that the legality of universal jurisdiction is unaffected by the method of its enforcement, the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal is inconsistent in its use of the term 'universal jurisdiction' and seemingly unclear as to what it encompasses. This opacity, again, reflects a certain elision of prescription and enforcement, which is, in turn, a function of the judges' inattention to the moment at which the requisite prescriptive jurisdictional nexus must be present.

The three judges observe at the outset:

As Mr Yerodia was a non-national of Belgium and the alleged offences described in the arrest warrant occurred outside of the territory over which Belgium has jurisdiction, the victims being non-Belgians, the arrest warrant was necessarily predicated on a universal jurisdiction.⁴⁵⁵

They then 'turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not present in the State's territory',⁴⁵⁶ and note, by way of preface, that, with the exception of the Belgian legislation in issue, 'national legislation, whether in fulfilment of international treaty obligations to make certain international crimes offences also in national law, or otherwise, does not suggest a universal jurisdiction over these offences'.⁴⁵⁷ The national legislation examined by Judges Higgins, Kooijmans and Buergenthal includes the Australian War Crimes Act 1945, as amended by the War Crimes (Amendment) Act 1988, which provides for the prosecution in Australia of war crimes committed during the Second World War by persons who, at the time of prosecution, are Australian citizens or residents; the United Kingdom's War Crimes Act 1991, which allows for the prosecution in the United Kingdom of certain war crimes committed in Europe during the Second World War by persons who, inter alia, have subsequently become nationals or residents of the United Kingdom; and the Criminal Code of Canada 1985, which establishes Canadian jurisdiction over offences in

⁴⁵⁵ *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 6.

⁴⁵⁶ *Ibid.*, at § 19.

⁴⁵⁷ *Ibid.*, at § 20.

circumstances, inter alia, where 'at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person's presence in Canada'.⁴⁵⁸ Judges Higgins, Kooijmans and Buergenthal then conclude:

All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially. But none of them, nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum State.⁴⁵⁹

Turning to national case law, the judges point to Dutch and German prosecutions:

23. In the *Bouterse* case the Amsterdam Court of Appeal concluded that torture was a crime against humanity, and as such an 'extraterritorial jurisdiction' could be exercised over a non-national. However, in the *Hoge Raad*, the Dutch Supreme Court attached conditions to this exercise of extraterritorial jurisdiction (nationality, or presence within the Netherlands at the moment of arrest) on the basis of national legislation.

24. By contrast, a universal jurisdiction has been asserted by the Bavarian Higher Regional Court in respect of a prosecution for genocide (the accused in this case being arrested in Germany) . . .

Next, Judges Higgins, Kooijmans and Buergenthal survey the treaty law. They draw attention to the first 'grave breaches' provision, common to the four Geneva Conventions of 1949, and incorporated by reference into Additional Protocol I of 1977, which provides that 'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed . . . grave breaches,

⁴⁵⁸ See *ibid.*

⁴⁵⁹ *Ibid.*, at § 21.

and shall bring such persons, regardless of their nationality, before its own courts',⁴⁶⁰ and they comment:

No territorial or nationality linkage is envisaged, suggesting a true universality principle

But a different interpretation is given in the authoritative Pictet Commentary . . . , which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to their own territory? Does the obligation to search imply a permission to prosecute in absentia, if the search had no result?⁴⁶¹

They also note the provision common to most international criminal conventions, discussed by President Guillaume and Judge Ranjeva, which requires each State Party to 'take such measures as may be necessary to establish its jurisdiction over the offences [in question] in cases where the alleged offender is present in its territory . . . ', or like formulation.⁴⁶² They state:

By the loose use of language [this] has come to be referred to as 'universal jurisdiction', though [it] is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.⁴⁶³

The judges make subsequent reference to 'this obligation (whether described as the duty to establish universal jurisdiction, or, more accurately, the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events)⁴⁶⁴ and to 'the inaccurately termed "universal jurisdiction principle" in these treaties'.⁴⁶⁵

⁴⁶⁰ See *ibid.*, at § 28.

⁴⁶¹ *Ibid.*, at § 31.

⁴⁶² See *ibid.*, at §§ 33–41.

⁴⁶³ *Ibid.*, at § 41.

⁴⁶⁴ *Ibid.*, at § 42.

⁴⁶⁵ *Ibid.*, at § 44.

Turning to academic writings, Judges Higgins, Kooijmans and Buergenthal refer to '[t]he assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not'.⁴⁶⁶ Finally, summing up their findings, the judges declare:

That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction.⁴⁶⁷

They even make passing reference to 'universal criminal jurisdiction *in absentia*'.⁴⁶⁸

2. Discussion

The marked terminological inconsistency of Judge Higgins, Kooijmans and Buergenthal is frustrating, and leaves the reader scarcely able to tell whether reference to 'universal jurisdiction' at any given point is to universal prescriptive jurisdiction, as such, or to universal prescriptive jurisdiction enforced without the offender's being present within the territory of the prescribing state. Perhaps even more to the point, the terminological distinctions drawn by the judges are less than sound. 'Universal jurisdiction', as emphasized already, is shorthand for universal jurisdiction *to prescribe*, and refers to the assertion of jurisdiction to prescribe in circumstances where no other lawful head of prescriptive jurisdiction is applicable to the impugned conduct *at the time of its commission*. The term applies irrespective of whether this prescriptive jurisdiction is exercised *in personam* or *in absentia*: just as prescription and enforcement are logically and legally distinct, so too are they terminologically independent of each other. Judges Higgins, Kooijmans and Buergenthal's references to 'classical' universal

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*, at § 45.

⁴⁶⁸ *Ibid.*, at § 49.

jurisdiction, ‘true universality’, universal jurisdiction ‘properly so called’ and ‘pure’ universal jurisdiction, when what they are in fact referring to is universal prescriptive jurisdiction exercised *in absentia*, are misplaced. Indeed, universal jurisdiction ‘properly so called’ is universal prescriptive jurisdiction *tout court*.

Similarly, Judges Higgins, Kooijmans and Buergenthal characterize the common treaty provision obliging each State Party to ‘take such measures as may be necessary to establish its jurisdiction over the offences [in question] in cases where the alleged offender is present in its territory . . .’ as a manifestation of ‘the inaccurately termed “universal jurisdiction principle”’ – also including under this rubric, by way of necessary implication, the Canadian Criminal Code’s provision for jurisdiction in circumstances where ‘at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person’s presence in Canada’,⁴⁶⁹ as well as the exercise by the Dutch courts of jurisdiction in circumstances where the only link to the Netherlands is the arrest of the accused in Dutch territory. Such exercises of criminal jurisdiction are, the judges assert, really examples of ‘territorial jurisdiction over persons, albeit in relation to acts committed elsewhere’ or, equally, of ‘a territorial jurisdiction over persons for extraterritorial events’. This terminology is unhelpful and, with respect, a trifle silly.⁴⁷⁰ In reality, these three exercises of jurisdiction are all manifestations of ‘universal

⁴⁶⁹ Note that the provision in question, s. 7(3.71–3.77) of the Canadian Criminal Code, has been repealed by the subsequent Crimes Against Humanity and War Crimes Act 2000.

⁴⁷⁰ Consider also *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at §§ 53–54 (emphasis added):

53. This brings us once more to the particular point that divides the Parties in this case: is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?
54. Considerable confusion surrounds this topic, not helped by the fact that legislators, courts and writers alike frequently fail to specify the precise temporal moment at which any such requirement is said to be in play. *Is the presence of the accused within the jurisdiction said to be required at the time the offence was committed?* At the time the arrest warrant is issued? Or at the time of the trial itself? An examination of national legislation, cases and writings reveals a wide variety of temporal linkages to the assertion of jurisdiction. This incoherent practice cannot be said to evidence a precondition to any exercise of universal criminal jurisdiction. . . .

jurisdiction', viz. universal jurisdiction to prescribe: that is, at the time of the commission of the offence, no other accepted head of prescriptive jurisdiction need link the prescribing state to the offender. All that is required is that the offender subsequently be present (or, in the Dutch case, be arrested) in the territory of the prescribing state – and this is a limitation strictly as to enforcement. As such, the three examples all constitute exercises *in personam* of universal jurisdiction. To call them 'territorial jurisdiction' is to confuse the terminology of prescriptive jurisdiction with the separate concept of enforcement.

Similarly, Judges Higgins, Kooijmans and Buergenthal do not characterize as assertions of universal jurisdiction the Australian War Crimes Act (as amended) and the United Kingdom's War Crimes Act, both of which grant the courts jurisdiction over persons accused of certain crimes committed during the Second World War where those persons have subsequently become nationals or residents of Australia and the United Kingdom, respectively. But both Acts do, in fact, represent assertions of universal jurisdiction in that, at the time of the commission of the offence, no other accepted head of prescriptive jurisdiction need have existed. The criterion of subsequent nationality or subsequent residency is a criterion only as to the scope of permissible enforcement. In other words, these Acts are examples of universal jurisdiction, albeit enforced only as against perpetrators who, at the time of enforcement, are nationals or residents of the prescribing state. These Acts are not examples of prescriptive jurisdiction on the basis of nationality or residency. Indeed, the Australian government explicitly stated that it was providing for universal jurisdiction through the subsequent nationality and subsequent residency provisions of the War Crimes (Amendment) Act 1988 – a statement accepted in principle in the High Court of

It might be observed that if, as a precondition to the assertion of universal jurisdiction, the presence of the accused were required at the time the offence was committed, it would not be an assertion of universal jurisdiction at all, but a straightforward assertion of jurisdiction to prescribe on the basis of territoriality.

Australia.⁴⁷¹ Scholarly opinion has also characterized such provisions as manifestations of universal jurisdiction.⁴⁷²

In turn, neither the requirement of the offender's subsequent presence in the territory of the prescribing state nor the limitation as to his or her subsequent nationality or subsequent residency undermines the cogency of the above legislative and judicial examples – where not pursuant to a treaty obligation – as state practice in favour of the permissibility under general law of universal jurisdiction to prescribe in relation to the offences in question. In each case, the state in question clearly considers it permissible to assert criminal jurisdiction over offences committed abroad by persons who, at the time of commission, are non-resident aliens, in circumstances where such offences are not deemed to constitute threats to the fundamental interests of the prescribing state (nor even to give rise to effects within its territory). Indeed, it is no coincidence that, in each example, the jurisdiction in question was exercised or is provided for in respect of offences widely considered to give rise to universal jurisdiction under general international law – in the Dutch prosecution, in respect of a crime against humanity; in the Bavarian prosecution, genocide; and in the Australian, UK and Canadian legislation, customary war crimes.⁴⁷³

⁴⁷¹ For both the Australian government's view and its acceptance, in principle, in the High Court, see *Polyukhovitch v Commonwealth of Australia* (1991) 91 ILR 1, at 116, 118, 138 and 144 (Toohey J.), and – even if he held the legislation in question to have exceeded the bounds of international law – at 39 (Brennan J., dissenting).

⁴⁷² As regards Australia's War Crimes Act 1945, as amended by the War Crimes (Amendment) Act 1988, see J.M. Wagner, 'US Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experience', 29 *Virginia Journal of International Law* (1989) 887, at 926; M.P. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position', 64 *Law and Contemporary Problems* (2001) 67, at 82, note 83, cited with apparent approval by Deen-Racsmay, *supra* note 29, at 614–615, note 54. See also Reydam, *supra* note 22, at 87; but cf. *ibid.*, at 91, where Reydam states contradictorily that 'the proceedings against Polyukhovitch [sic.] were *not* an exercise of universal jurisdiction' (original emphasis). As regards the UK's War Crimes Act 1991, see A.T. Richardson, 'War Crimes Act 1991', 55 *Modern Law Review* (1992) 73, at 76, 77 and 78; Meron, *supra* note 42, at 573; Reydam, *supra* note 22, at 205.

⁴⁷³ See also now s. 68, in combination with s. 51, of the International Criminal Court Act 2001 (UK), providing for jurisdiction in respect of genocide, crimes against humanity and war crimes over an accused 'who commits [the relevant] acts outside the United Kingdom at a time when he is not a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction and who subsequently becomes resident in the United Kingdom', in the words of s. 68(1). See, also, to identical effect, s. 6 of the International Criminal Court (Scotland) Act 2001 (UK), in combination with s. 1(1). For the characterization of these provisions as manifestations of universal prescriptive jurisdiction, see R. Cryer, 'Implementation of the International Criminal Court Statute in England and Wales', 51 *ICLQ* (2002) 733, at 742; Reydam, *supra* note 22, at 206. For its part, however, the UK's Foreign and Commonwealth Office

In each of these examples, the restriction on the enforceability of the offence would seem to be largely political. As Judge ad hoc Van den Wyngaert remarks, speaking specifically of the requirement of the offender's subsequent presence in the territory:

. . . [i]t may be *politically* inconvenient to have such a wide jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law.⁴⁷⁴

The same political considerations could be seen equally to underpin the requirement of subsequent nationality or subsequent residency. Given the Pinochet experience in relation to its more expansive enforcement of universal jurisdiction over torture,⁴⁷⁵ such considerations almost certainly helped motivate the United Kingdom, when enacting the International Criminal Court Act 2001, to restrict the enforcement of the offences of genocide, crimes against humanity and war crimes, when committed outside the United Kingdom by persons not, at that time, UK nationals, UK residents or persons subject to UK service jurisdiction, to the prosecution of those persons who subsequently become resident in the United Kingdom.⁴⁷⁶ Indeed, the point about international relations

(FCO) made no reference to the international legal basis for the subsequent nationality and subsequent residency provisions of the International Criminal Court Act in the Explanatory Notes to the Act which it prepared: see *Explanatory Notes. International Criminal Court Act 2001. Chapter 17* (2001), at § 109; and the relevant government ministers did not characterize the Act as providing for universal jurisdiction: see 620 *HL Deb* (5s) 928–929 (Parliamentary Under-Secretary of State for the FCO), 620 *HL Deb* (5s) 999–1000 (Attorney-General) and 366 *HC Deb* (6s) 278 (Minister of State for the FCO). In the Scottish Parliament (which, under constitutional devolution arrangements with Westminster, enjoys competence to pass criminal laws), an amendment proposed by one of the smaller opposition parties, but defeated, sought to replace what was termed the ‘partial universal jurisdiction’ of the International Criminal Court (Scotland) Act – i.e. what was referred to as ‘the residence test’ – with so-called ‘absolute universal jurisdiction’, i.e. jurisdiction based merely on the subsequent presence of the offender in the territory: see Scottish Parliament Official Report, Thursday 13 September 2001, Session 1, col. 2418.

⁴⁷⁴ *Arrest Warrant*, diss. op. Van den Wyngaert, at § 56 (original emphasis). See similarly Ratner and Abrams, *supra* note 45, at 185.

⁴⁷⁵ See Criminal Justice Act 1998 (UK), s. 134, at issue in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* (1999) 119 *ILR* 135.

was made in the devolved Scottish Parliament during the passage of the analogous International Criminal Court (Scotland) Act 2001, where the spectre of ‘political repercussions for Scotland’ was raised.⁴⁷⁷ Other compelling reasons for the restrictive enforcement of universal prescriptive jurisdiction would appear to be practical. As Judge ad hoc Van den Wyngaert again observes, referring once more specifically to the requirement of the offender’s subsequent presence in the territory:

. . . [a] *practical* consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be that States are afraid of overburdening their court system The concern for a linkage with the national order . . . seems to be more of a pragmatic than of a juridical nature. It is not, therefore, necessarily the expression of an *opinio juris* . . .⁴⁷⁸

The need to avoid overburdening the courts was one explicit motivation behind the subsequent nationality and subsequent residency restrictions in the United Kingdom’s War Crimes Act 1991;⁴⁷⁹ and a similar desire not to become a ‘global prosecutor’,⁴⁸⁰ along with reservations as to the practicability of evidence gathering,⁴⁸¹ were cited in debate in the Scottish Parliament over the jurisdictional provisions of the International Criminal Court (Scotland) Act. It should also be kept in mind when considering the requirement of the offender’s subsequent presence in the territory that municipal law might stipulate this as a

⁴⁷⁶ See *supra* note 94.

⁴⁷⁷ Scottish Parliament Official Report, *supra* note 94, col. 2423.

⁴⁷⁸ *Arrest Warrant*, diss. op. Van den Wyngaert, at § 56 (original emphasis, citations omitted). Recall also Ascensio, *supra* note 38, at 700 (‘The presence of the accused on the territory of the prosecuting state, a prerequisite for the implementation of the universal jurisdiction doctrine in many domestic legal systems, is not a link in the sense of a basis of jurisdiction, but only a *procedural condition for the exercise* of universal jurisdiction, usually required for practical reasons.’). See, also, Ratner and Abrams, *supra* note 45, at 185; D. Turns, ‘Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States’, in D. McGoldrick, P. Rowe and E. Donnelly (eds), *The Permanent International Criminal Court. Legal and Policy Issues* (Oxford: Hart, 2004) 337, at 347–348.

⁴⁷⁹ See *HC Stand. Comm. 1989–1990*, Vol. I, Standing Committee A. War Crimes Bill. 29 March–3 April 1990, cols 45–46 (Minister of State for the Home Office).

⁴⁸⁰ Scottish Parliament Official Report, *supra* note 94, cols 2422 and 2424.

⁴⁸¹ *Ibid.*, cols 2422, 2423, 2425 and 2427.

precondition for the criminal courts' exercise of jurisdiction. In sum, the circumscribed enforcement of universal prescriptive jurisdiction is not, without more, cogent evidence for an ambivalence on the part of states over the permissibility under general international law of the assertion of such jurisdiction *in limine*.

One important upshot of all this is that, when the assertion by states of so-called subsequent presence, subsequent nationality and subsequent residency jurisdiction over crimes under general international law is taken into account, there is more state practice to support the permissibility of universal jurisdiction over such offences than Judges Higgins, Kooijmans and Buergenthal – and, *a fortiori*, President Guillaume and Judges Ranjeva and Rezek – credit.⁴⁸² This is potentially significant, given the latter three's respective findings that general international law does not recognize universal jurisdiction over war crimes and crimes against humanity. Just how significant it is depends, of course, upon how many states assert subsequent presence, subsequent nationality and subsequent residency jurisdiction over such offences. This is something which calls for empirical research. The point to be made here is that these three manifestations of jurisdiction are rightly to be counted as exercises of universal jurisdiction to prescribe.

Finally, it should be added, *ex abundante cautela*, that because the above examples of subsequent nationality and subsequent residency jurisdiction are actually, and merely, exercises of national criminal jurisdiction on the basis of universality over crimes under general international law – and, critically, over crimes that existed under general international law at the moment of their commission – they do not in any way infringe the prohibition on *ex post facto* criminalization embodied in international human-rights law.⁴⁸³ In accordance with

⁴⁸² In this light, it should be noted that three prosecutions were initiated under the 1988 amendments to Australia's War Crimes Act 1945 and two under the UK's War Crimes Act 1991: see Reydam, *supra* note 22, at 87 and 205 respectively. None of these apparently drew protest from the state of nationality of the accused.

⁴⁸³ It is for this reason that Cassese, restricting his discussion to international crimes, is correct when he states that 'nationality may be possessed at either moment', viz. either 'when the crime is perpetrated, or when criminal proceedings are instituted': Cassese, *supra* note 65, at 282. The international criminality of the relevant war crimes at the time at which they were committed (i.e. during the Second World War) was

the major international human-rights instruments, which are consonant to this extent with customary international law, the principle of legality is not violated in cases of municipal retroactivity if the impugned conduct constituted an offence under international law at the time of its commission.⁴⁸⁴ In such cases, all that has happened is that a municipal procedural competence has later been extended to encompass conduct that was substantively criminal, under international law, when performed. At the same time, if a state's municipal law defines such crimes in a manner that is broader than the international definition that prevailed at the time of their commission, then its exercise of subsequent nationality or subsequent residency jurisdiction in relation to them is, to the extent of the overbreadth, exorbitant in the eyes of international law.⁴⁸⁵

6.4. Conclusion

Governments, academics and students were looking to the ICJ's judgment in *Arrest Warrant* for a limpid elaboration of the international legal principles governing national criminal jurisdiction, in particular of universal jurisdiction. But the various judges ended up muddying the waters. It can only be hoped they take the second chance provided by *Certain Criminal Proceedings in France*⁴⁸⁶ to clarify the law.⁴⁸⁷

the explicit justification, in the face of concern over offensive retroactivity, for the subsequent nationality and subsequent residency jurisdiction asserted by the War Crimes Act 1991 (UK): see *War Crimes. Report of the War Crimes Inquiry*, Cmd 744 (1989), §§ 6.41–6.44 and 9.27; 513 *HL Deb* (5s) 604 and 607 (Minister of State for the Home Department); 169 *HC Deb* (6s) 928 (Attorney-General); 519 *HL Deb* (5s) 1083 (Minister of State for the Home Department); 188 *HC Deb* (6s) 24 (Secretary of State for the Home Department).

⁴⁸⁴ See Universal Declaration, Art. 11(2); ICCPR, Art. 15(1); ECHR, Art. 7(1). By way of aside, it is interesting to note that none of these international guarantees requires that the relevant crime under international law must also, at the time of its commission, have been subject to universal jurisdiction on the part of states, and it is worth speculating whether the drafters simply considered the latter to be an inherent incident of the former. For a discussion of the relationship between the concept of a crime under international law and the concept of universal jurisdiction in the specific context of the prohibition on retroactive criminal laws, see *Polyukhovich*, *supra* note 92, at 120–121 (Toohey J.).

⁴⁸⁵ See, generally, *Polyukhovich*, *supra* note 92, at 41–51 (Brennan J., dissenting).

⁴⁸⁶ *Certain Criminal Proceedings in France* (Republic of the Congo v. France), International Court of Justice, General List No. 129.

⁴⁸⁷ But cf., on a less optimistic concluding note, M. Henzelin, 'La Competence Penale Universelle. Une Question non Resolue par l'Arret Yerodia', 106 *Revue Generale de Droit International Public* (2002) 819, at 852: '[F]orce est d'admettre que les opinions [dans l'affaire du *Mandat d'arret du 11 avril 2000*]

divergent du tout au tout, ce qui ne manque pas de faire craindre qu'un prochain litige soumis a la Cour internationale de Justice ne soit tranche que par la force des majorites, alors que les consequences d'une decision, quelle qu'elle soit, ne sont pas faciles a prevoir (impunite ou chaos).'

CHAPTER 7

NUREMBERG PRINCIPLES AND UNIVERSAL JURISDICTION

7.1 The relevance and importance of nuremberg preinciples

Of late, there has been a sort of proliferation in writings on International Criminal Jurisprudence. A perusal of the voluminous literature shows, however, that though much has been written on the subject, still some problems remain understudied if not neglected. The subject under consideration is a case in point.

The standards of accountability set in Nuremberg would apply evenly to all, because as you recall, in Nuremberg, one of the major criticisms was that, that was the victor's justice and that was the victor's tribunal and the victors were the ones who were setting the standards, and they were not applying those standards themselves, but they were simply applying those standards to the vanquished. Today the need is evident: those standards be applied to all, that there be effective mechanisms so that those standards are met and implemented.

Contextually, the most important question: "What is Nuremberg's legacy in terms of the principles ? What is their input ? What is their impact ? When there is an explosion of human rights norms and instruments today, it is no longer just fashionable to talk about human rights, to invoke human rights, but it has become a common place to consider human rights as a common language of humanity. We do that, then you can just see that Nuremberg is the one that began that process. There were many obvious reasons for what happened in the post-Second World War and the explosion of human rights norms, but I think we can go back to Nuremberg to say that that is where it all began. Killing fields of Cambodia, horrors and tragedies of Rwanda, Bosnia, Sierra Leone, the Congo and there are many. I would not go into them.

But at least at the present time, we need to look at what the International Law Commission did. The International Law Commission adopted the principles in 1950. The General Assembly had directed the Charter of the Nuremberg Tribunal; and in the judgment of the Tribunal, it had said that the Commission could formulate the principles of international law recognized in those - the charter and the judgment. It was obviously the first international modern criminal tribunal, which tried those people who had committed war crimes. It obviously is the singular achievement that there was a trial and not just summary executions. Churchill among others had said that there ought to be simply those executions. He had sought those, but in 1945, after the Conference, we do have one stirring example of how people at Nuremberg looked at it. The Chief Prosecutor at Nuremberg Justice Robert Jackson eloquently articulated the sentiment and many of us have heard it, but let me repeat it. 'There were four great nations flushed with victory, but strangled with injury.' I will skip some of it. 'The stay we had, of vengeance and voluntarily submit their captive enemies to the judgment of the law, he said, this is one of the most significant tributes that power has ever paid to reason.' That is how it all began.

You remember that those principles, if I can just simply summarize them and not to go through all of the, the first one would be that there is individual accountability for individual international crimes; the second is the superior orders is not going to be a defence anymore. I will very briefly summarize them. I would look at the crimes under international law and made complexity in those crimes, that is the common plan and conspiracy charge an international crime. You recall them - let me simply mention them again to you to remind you, crimes against peace. It is planning, preparation all of that, but waging a war of aggression, war crimes, they are violation of laws or customs of war, crimes against humanity, murder, inhuman acts against civilians on political, racial or religious grounds carried on in execution or connection with any crime against peace or any war crime.

These principles constitute a watershed. Indeed, a paradigm shift in international law, a transition from the state centered system of unbridled state sovereignty,

established in the peace treaty of West, and to an evolving international system, based on the foundation of the Nuremberg Principles. Basically that was, maintenance, restoration of international peace and security, constraints on the use of force, criminal individual responsibility, primacy of human rights and international humanitarian law.

We must recall that Westphalia, state centered system was a transformation from the one that preceded it. The one which was before 1648, the Pope and Emperor had jurisdiction over the local sovereign, claiming spiritual, temporal authority. After Westphalia, what happened? That it was the rein of state sovereignty, with almost unlimited powers to wage wars, even wars of aggression. The words are classic: war is nothing more than a continuation of political relations with addition of other means. Even Appar Heigm in the early 20th Century had said, international law cannot object to states going to war, but does oblige them to follow certain basic rules of conduct. Thus, there was no attempt to criminalize, resort to war before Nuremberg.

Under customary international law, there was no conventional law, no recognized category of such crime; only aliens were protected; you recall that there were atrocities by foreign governments and how a nation treated its own citizens, was nobody else's concern, not an international concern, but simply a nation state could do what it wanted to. The example of the Swiss government that tried to safe Swiss Zeus from camps, but did not talk about the German nationals at all. The London Charter, limited prosecutions of crimes against humanity to those 'in execution of or in connection with any crime within the jurisdiction of the tribunal'. That is, they must be connected with wars and war crimes, and crimes against peace. You remember that it has been changed. Even after that, there was a change, not for Nuremberg, but for the latter trials that the US did conduct itself.

Application of international law norms in this area, especially in these kinds of offences. You find that today; there are those changes. And I will touch very briefly on them. But regarding was crimes, you have to mention that both the

Conventions and laws - The Hague Conventions, Geneva Conventions, customary international law, it was better developed.

So, briefly outlining and not going into the details, what is the legacy ? How are these principles important today ? On the aggressive wars, UN charter, Article 2(4), Article 51, Chapter VII, 'constraints on the use of force'. Security Council to have responsibility - responsibility for the maintenance of international peace and security.

Very certainly you can say that there is aggression, but still there is lack of consensus on it. Now, there are specifics, collective security you have seen, this last September, at the UN Summit, did not resolve much; it did talk about the obligation to protect. Canada had taken the lead on it. The Secretary General has asked the General Assembly that there ought to be a way to see that Rwanda's do not happen; he had asked that when the US has unilaterally gone into Iraq, using force, talking about not simply preemption, but prevention as a basis for its own unilateral use of force. He said that the time has come that we ought to consider is the UN Charter and all those Nuremberg Principles being reflected in it, adequate effective today in order to see that there are effective constraints on the use of force. September meeting did not result in very specific concrete changes, developments that you and I can touch upon and say that the Security Council today is representative; India is not there, Japan is not there, Germany is not there, Brazil is not there, African countries are not there and there is no consensus as to how at the present time, to re-constitute the Security Council.

On the use of force, not much has happened. The Human Rights, instead of that body to have a Human Rights Council, it is lean and mean, not much has happened there even. So4 at the present time, we are still struggling, searching, seeking, and striving in order to bring about those changes that the principles had brought on the use of force.

I can simply mention the Geneva Convention of 1949 and its two Additional Protocols of 1977, fill the gaps that at the present time we find are filled and they were at the time of Nuremberg, in international military law, especially on taking of hostages and reprisals. Crimes against humanity, no longer, just there is reliance on customary international law, because there is codification. Today you do find that crimes against humanity as modified and controlled Council law number 10. No longer just these was crimes are crimes against peace, but they became the core of what we see as the genocide convention today. All these Ad hoc tribunals are there; I was going to touch upon some.

The International Criminal Court is there; now there is code of crimes against the security of mankind, but still all of that is in a very abstract kind of fashion, not in very concrete terms, before us. Nuremberg trials had their own difficulties on fairness, on due process, on loose evidence or hearsay evidence; many of those problems were there. Justice Jackson did note also at the time wrongs; he said 'which we seek to condemn and punish have been so-calculated, so malignant, so-devastating that civilization cannot tolerate; they are being ignored because it cannot survive their being repeated'. These principles provided a blueprint for a better world, a vision for a better future that is yet to be realized.

At the present time, we can say that they lay the foundation stones of this huge structure that has been built on it. The one we see and study, the foundation stones are hidden, but provide the buildings strength; they provide the buildings integrity; they are constant reminders that individuals and states in this global system are responsible; they are accountable and accountable internationally; there are standards that ought to be applied universally; they must be fair; they must be given due process in these trials to defend them. There must be effective mechanisms for enforcement.

To conclude by saying that it is a pity that even after 60 years of the Nuremberg, little attention has been paid to the subject is deals with. Could it be that we have taken for granted all these developments in international human rights and the institutions established to implement them or in our psyche could there be that

twinge, that perhaps nothing substantial has changed, that genocide, torture, massacres, ethnic cleansing, gross human rights violations are still with us very much a part of the landscape of humanity? That is, human rights laws lack effective implementation, which the political will is still lacking to ensure the dignity of the individual. And I further say; whichever scenario, one prefers the conclusion is inescapable - as a civilization, we have miles to go.

7.2 Reflections on international criminal justice

It is intended to reflect here on the international criminal justice. I will be general in my observations. Unfortunately, it so happens that there is dark cloud over the landscape of human affairs, even in this so-called civilized age, the 21st century; and we should be looking towards the platform of peace and justice, which all the nations can enjoy.

Unfortunately, we started the century by resorting to war. It should have been a century dedicated to the purpose of achieving peace. We still have this dark cloud and we have very important task before us to see how law can, to some extent, even mitigate this phenomenon in human affairs, mitigate war and at least pass a few rays of sunshine into this rather thin scence. Now, we can do so, through humanitarian law and humanitarian law is something which was not debated yesterday. It is something that comes down to us from distant antiquity. For thousands of years, human beings have been forced to go to war; so, at least we should mitigate the suffering and behave with some humanity.

ICRC launched a study on customary international humanitarian law. It is a tremendous study of about 3,000-4,000 pages where, over ten years of research, the ICRC has got together and looked into every scrap of material that they could in relation to customary international humanitarian law. So, works of scholarship of that nature are very important in developing international criminal justice and it is important that this information reached not only the statesmen- the Prime Ministers and the Presidents of the world- not only the generals, but also the public, also the schools, the diplomats, the judges, where there is so much unawareness of the basic principles of international law. That is why the leaders

of the world are able to violate principles of international law rather grossly in their dealings with other states. The people do not know the extent of these violations and therefore, they are unable to restrain them. International law, as we know, started mainly with the work of Grotius in 1625 and he quite rightly; for reasons of the wars of religion at that time, distanced himself from the teachings of religion and from religions as such. He tried to work out the international law, on the basis of human experience. We are no longer living in the time of Grotius.

There are no longer the possibilities of all these various religious conflicts. We have a common heritage of mankind from which we must draw the basic reservoir of principles which will guide us into the future where we can look forward, as I said, to a plateau of peace and justice, because if we take the other road, we go down. But this way, if we make the right choice, we can lead humanity upward towards justice, freedom and peace.

All those principles are there in the traditional systems, but in modern law, we tended to ignore them. From time to time, I keep reminding my colleagues that there is so much that we have not drawn upon. In fact, I made the proposal yesterday to the ICRC that as a sequel to the wonderful work that they have done, they should appoint a group to look into the customary rules of IHL in all the great cultures of the world, appoint teams of scholars to study at length the texts of Hinduism, the texts of Islam, the texts of Buddhism, the text of Christianity, the texts of Judaism; and you will find enormous sets of principles that you can evolve from those, which will guide us to the criminal law justice of the future which we have to evolve.

Let me give you a few examples. Take Islamic law, for example. It has developed so considerably ever since the great renaissance of learning in Islam during the dark ages of knowledge in the West. Eight centuries before

Grotius wrote his treaties, on war and peace, they have treaties on international law in the Islamic world. For example, they have collections of teaching in regard to what weapons one can use, how do you treat POWs, what are the rules of

battle that you can engage in and so on and so forth. Here, we have Ten Commandments of Abu Baker, based on the Prophet's Teaching. 'Do not kill a woman or a child or an old man; do not cut down fruit-bearing trees; do not destroy inhabited areas; do not slaughter sheep, cows or camels; do not burn date-palms; do not embezzle; do not commit perfidy, etc.

All rules were worked out long years ago which everybody forgets. The Keliforma, for example, has given his commanders these commandments; do not commit perfidy, do not mutilate, do not kill children, do not kill the unarmed, etc. Then there are rules against misappropriating booty, non-combatants are not to be attacked; POWs are to be treated kindly. The tradition of the Prophet even says that treat the POWs with great kindness; give them cloths and food. Not only that, see that their correspondence is taken back to their homes, even across the line of battle. It is in advance of any of the moral conventions. But it is there in ancient teachings. So, we have got to show that all these things are traditions of the whole of humanity, which we can draw upon. Likewise, in the Ramayana and in Hindu Literature generally, there are most detailed rules in relation to conduct in time of war. It is unethical to fight and kill unarmed people, children, women, the aged, the person who is starved, which is equal to killing of a child, and there are the traditions that are there in ancient times.

Even when there was an invading army, the farmers in the field could continue to till their fields because they knew that under the laws of warfare, they could not be attacked because they are non-combatants. There has been so much thought given to these matters in ancient times. Also, it is thought like this - which has a great deal of imagination behind it - because for example, the kind of weaponry that they visualized is quite amazing to think that they visualized weaponry like this. For example, you find these passages: Vishwamitra for example, the teacher of Rama, had at one stage a whole set of missiles available to you, including the following; note the description. The soporific missile, which will put the enemy to sleep; the intoxicating missile, which will unhinge their minds, missiles that are unbearably hot; the missiles that dries up everything; missiles that tear things apart; missiles like the thunderbolt; missiles which shatters

everything; missiles that are as deadly as death itself. So, those ancient writers used their imaginations very vividly about how weapons could be devised and they also used their imaginations to counter them. That is why we have those passages, which said that weapons of hyper-destructive nature are totally banned.

Likewise, if you go to other philosophies like Buddhism, which is amazingly rich in its psychological insights on warfare. According to Buddhism, all warfare would be completely banned, but there is this idea that it is important to prevent the causes of war. It is very easy to talk of terrorism and countering terrorism. It is much more important to see what are the causes of terrorism. To counter those causes, this is what Buddhism teaches, violence begets violence, force begets force and anger begets anger. There is no such thing like conquest by force because every victor is a loser. He has incurred the hatred of the subjugated. What is important is to settle the disputes.

When I was in the International Court, I had the idea of getting a great sculptor in Sri Lanka to sculpt a huge bronze of the Buddha settling a dispute in Sri Lanka between two warring parties; and the leaders of the two parties break their weapons at his feet. That bronze now hangs outside the deliberation chamber of the Judges of the court, reminding them that that is the main duty of international law - the settlement of disputes and the avoidance of disputes rather than wars as a means of resolving disputes because wars never settle anything.

Likewise, the counsels of the church - in Christianity the Church was very concerned in early stages with the nature of weapons. For example, the Lateran Counsel in 1137 said that even the crossbow, which had then been invented, was too cruel an instrument to be used in warfare among Christian nations, and the church went into all these matters in great detail. So, today while everybody profess allegiance to one or other of these religions, they continue to do the very opposite. It is time to remind them that the teachings of religion must be studied and there is much of wisdom in that, which can be incorporated into modern law. That religion must not be kept away, as a source of inspiration, as Grotius tried to

do. But the time has come for us to look at all these religions and see about the traditional teachings, which emerge. There is so much of commonality about the teachings of these great religions.

One of the great things, which we have to do to salvage the world from the destruction that was threatens it with, is to see that all the cultures of the world are not clashing with each other. They are all congruent in regard to the basic principles that they teach, about the humanitarian conduct, about the rules of war, about justice, about international criminal justice, etc. Take African custom for example. How, when there are wars, there are certain principles about the war, how the war should be conducted, how people who have violated those rules are to be punished, and a great deal of detailed research must go into resurrecting those customs and finding out the concern there basic things.

Some while ago, when we were doing the Nauru Commission, we investigated the practices in the Pacific and we found that in the Pacific, there is a custom which dictates very strongly respect and reverence for environment. People like Marinouske looked into the customs of the Tobrian Islands and found out, how precise tribal rules were. So, this is one of these sources of inspiration, which we must bring into it in developing international customary law. In regard to criminal justice, there is a tremendous need to use international customary law to develop its basic principles.

I have had no time to deal with institutions of international criminal law where international criminal court is a wonderful achievement. Its jurisprudence has got to be developed; its relationship with the Security Council with the host State with the International Court of Justice, all of these are areas for development for the international criminal justice for the future. But my theme generally is that the great fertilizing source of international criminal justice will be the customs and traditions of humanity. These have to be researched; these cannot be neglected; and out of them, there will be rich reservoir of fundamentals, which all of us can agree on, which can be the basis of the world order of the future.

7.3 Law and politics in the global order : The problems and pitfalls of universal jurisdiction

I would like to begin this paper with a quote from the judgment of Judge Radha Binod Pal who was one of the judges of one of the Ad hoc Post World War II Tribunals. I consider his contribution to the development of international criminal justice and to the doctrine of universal jurisdiction extremely important. There was a conspiracy of silence about him and his role in post World War II criminal justice ever since those years in the second half of the 1940s. Let me quote two sentences from his judgement, which in fact was a dissenting opinion at the post World War II Tribunal. He said in his judgement : "It has been said that a victor can dispense to the vanquished everything from mercy to vindictiveness. But the one thing the victor cannot give to the vanquished is justice." He further said in his judgement : "The name of justice shall not be allowed to be invoked only for the prolongation of the pursuit of vindictive retaliation". A similar guiding principle has been advanced or formulated by the leading philosopher of law of the 20th century, namely, Hans Kelsen. He wrote just a year before these two post World War II Tribunals, established around a year before that. In his work, *Peace through law*, he said : "Only if the victors submit themselves to the same law, which they wish to impose on the vanquished states, will the idea of international justice be preserved." These were the statements of Justices.

The post World War II exercise of universal jurisdiction failed in regard to those principles; and they failed very clearly and miserably. In order to avoid any misunderstanding, the achievement of the so-called Nuremberg Principles is definitely that a list of international crimes have been established; a definition has been made; of course, this list - as has been complimented in the light of the development - is a historical legacy, which has to be emphasized and which has to be preserved. But the way the principles of universal jurisdiction has been implemented, that is not an exemplary one and should not be followed. The question which interests me - which I have dealt with in more detailed in a book which just has been published now in India with the title 'Global Justice' or 'Global Revenge' - is, has the project of universal jurisdiction been advanced, has any

progress been made in the decades following the period after the Second World War.

For me, as a philosophical observer, who is interested in the theory of law and not in the politics of law, the crucial question is the following : Will the beauty of philosophical idea, namely the universal jurisdiction that there are beauties that exist vis-a-vis all obligations and that it is the responsibility of the entire international community to look after the implementation of these principles ? Will the beauty of such a philosophical idea, which is similar to that idea, or to the notion of perpetual peace, which stands the tests of political reality, survive ? Will this rather fragile idea survive or will it be practicable under the harsh conditions of power-driven international politics ? That question is even more burning and pertinent today in a unipolar international environment in which there is no balance of power than it was in the decades until around 1989 when at least there was a kind of a bipolar balance.

My question is how can a concept that essentially requires a supra national organizational structure be implemented in an environment that is characterized by the interaction among the sovereign nation states ? Has the notion of universal jurisdiction eventually arrived too early on the international scene ? So far as I could see and I was myself observer appointed on the basis of a binding Security Council Resolution in one of the major international criminal trials in the case of international terrorism, so far, I would say universal jurisdiction has almost exclusively been implemented or rendered in the form of victors' justice.

As far as the title of my presentation is concerned, this is unfortunate and I cannot go into details because the space at my disposal does not allow that. The title namely, the problems or pitfalls of universal jurisdiction has partly been inspired by Henry Kissinger also, his motivation reflecting about universal jurisdiction was quite different from mine because he, as a former actor on the international scene does not only have an academic interest. But let me just clarify what I mean. I would clarify the concepts and I would not have time to go into the details. Firstly, as far as the problems of universal jurisdiction are

concerned, I would distinguish between two levels - one is that of international power politics namely, and excessive emphasis on state sovereignty and national interest. That has been the predicament of universal jurisdiction up to the present day, not only in the framework of the new Ad hoc Security Council Tribunals and also the framework of the Rome Statute of the ICC, about which I would like to speak, but I have no time. The second level as far as the problems of universal jurisdiction are concerned, is that of enforcement. There is now a supra national permanent structure, the ICC; but the judicial authorities asking questions and it has been stated earlier by the President of that entity; he stated the obvious, that they have to rely on the cooperation of the nation states; otherwise, they cannot achieve anything.

As far as the pitfalls are concerned - that was the term Henry Kissinger has introduced - I again see two levels or two connotations. First of all, I would use the term, 'in regard to the inconsistencies in the application of universal jurisdiction', there is a real credibility problem because of an almost unavoidable judicial policy of double standards and that policy of double standards which I could give dozens of examples for, is resulting from a lack of separation of powers in the international context. I do not blame the institutions themselves, whether the ad hoc courts or some of the new hybrid courts or the ICC, there are structural problems which they cannot do away with. There is a real danger that these courts are getting entangled in the wake of power politics and that they will be held accountable by the international public for something about which they can do nothing about.

Of course, there is another meaning of pitfall; that is exactly the one which Henry Kissinger meant and which motivated him to write that article in foreign affairs; that relates to the risks involved for leaders and officials of sovereign states; it involves particularly the negation of sovereign immunity; that is, one of the essential aspects of the idea of universal jurisdiction. Secondly, there is another aspect which is so often overlooked by the supporters of international criminal justice, namely the fact that judiciary within a trans-national context, particularly one outside the framework of the Security Council based on an international

treaty, is somehow beyond the political and that also means, democratic control as far as the nation states are concerned. That problem has not sufficiently been addressed so far, as I can see because time is so short which we have been here, and I only would like to add a few more remarks on the international criminal court.

It is now in an operational phase at least officially since the year 2002 and we have already been able to identify some of the real difficulties as far as the implementation of the idea of universal jurisdiction is concerned. One of those difficulties as far as I can see is the relation of the ICC's operation to the Security Council of the UN. That is a body which is in charge of measures for the preservation or restoration of international peace and security. It is not in itself a judicial body, but anyhow it has got certain things. In the Rome Statute of the International Criminal Court, it got assigned to it, a certain judicial function, namely, the one described in Articles 13 and 16 of the Rome Statute.

There is a case which demonstrated the problematic nature of the influence of the Security Council, on the proceedings or the operation of the ICC in a very good manner and I mean, the referral of a situation namely that of Sudan to the ICC. Undisputedly, referral of a situation in which international crimes may have been committed, through the prosecutor of the ICC is a sufficient basis for exercise of jurisdiction by that court. However, in my analysis, it clearly follows from the wording Article 13(b) of the Rome Statute that any referral of a situation by the Security Council must be made without conditions as to categories of people to be investigated or prosecuted by the court and for that reason, I would say that in an inadmissible way, the Security Council has tied the referral of the situation in Sudan, according to Article 13(b) to a deferral of investigation or prosecution according to Article 16 because the Council in that Resolution has stipulated or has stated that this referral does not authorize the International Criminal Court to prosecute any persons from states that are not states parties to the Rome Statute. The Council has no such rights to insist on what we include such a kind of collective and preventive deferral into a decision on a referral.

The entire drafting of the text of this Resolution, in my view, is really a scandalous aspect of international law and the International Criminal Court should not have accepted it. However, the Court has now taken up investigations on that particular issue, by the way, as far as we know, as of today and I have studied the report of the International Court. There are only two other cases that are being handed at the moment. These are related to two other African states. No other case is officially being investigated or no other prosecution has been taken up. Of course, the report of the court to the UN has stated that they are dealing with certain other situations, but they are keeping this as a secret and they have not revealed anything about it.

My question now is, is a permanent structure such as that of the ICC which is based on an international, inter-governmental agreement, really strong enough and universal enough so as to practice universal jurisdiction in a credible manner and is the ICC strong enough and sure enough of its position to take up investigations and prosecutions when its prosecutor considers this appropriate because the prosecutor may also act properly. He has not done that so far. One question that many international observers ask is, why the ICC has not yet initiated an investigation of the situation in Iraq ? Of course, there is no territorial jurisdiction, that is quite clear. And there is also, no jurisdiction as far as the crime of aggression is concerned; at least, not yet because that crime has not yet been defined. But there would be nationality jurisdiction as far as one of the countries that have waged an unauthorized war in Iraq, namely the UK. There is plenty of documentation of war crimes, crimes against humanity. Recently also, all those events that have been documented in the South of Iraq would be enough reason as far as I can see, to initiate an investigation because the judicial authorities of the country in question, namely the UK have not taken up any credible measures of criminal prosecution. They have been trying, on the contrary, to shield their own people, particularly soldiers and other people who were engaged in subversive actions in the South of Iraq. They had been trying to shield them from prosecution and they have tried to keep everything secret.

Another issue, as far as the ICC is concerned, of course, is that of its lack of representability. It is the figure or the number of states parties is quite impressive.

It is around 100 as of today. So, that is the majority of member-states of the UN. But the question is which States have ratified the Rome Statute and when we go through the list, we see that the majority of states with strong military capabilities or with strong armies, that have a strong influence on the internal make up of the respective political system have not ratified the Rome Statute or have not acceded to the Rome Statute. That means, whether the ICC writes it or not, it lacks certain credibility because the actors or those who are politically responsible in those states that have the strongest capacity to eventually commit breaches of international law and commit war crimes cannot be prosecuted because there is lack, either of territorial or of nationality jurisdiction because of the other factor of course, that the only other entity, the decision of which can lead to a prosecution in the Security Council; and what will you expect of such a body where power politics is the supreme principle, where you have the veto power of five permanent members. That means, whenever the Security Council makes a referral, it will have gone, so to speak, through the channels of power politics; it would have been filtered through those channels and really, grave cases of international crimes committed by personnel or politicians of permanent members of the Security Council or allies of those permanent members, will of course, never be referred to the ICC and if it here is a referral, even this, in my view, illegal precaution will be inserted into a Security Council Resolution according to which the ICC should have no jurisdiction over military personnel from non-state parties.

That brings me to the final remarks of my presentation. Nonetheless, all these problems and pitfalls which I have described, even if the ICC transcends the Ad hoc arrangements that have so far characterized the practice of universal jurisdiction, the basic question remains whether such a court will be in a position to establish its authority, in this prevailing system of international law and whether they would be able to defend an essentially super-national ideal, vis-à-vis. the often conflicting interests of states parties. The litmus test in that regard will be whether the ICC will take up, as I said, *suo motu* high profile cases where it has jurisdiction on the basis of nationality or territoriality or whether it will wait for referrals, clear as they are through those channels of power politics from the

Security Council as in the case of Sudan or whether it will wait for referrals of situations in some poor African countries that have no influence in international affairs.

The fate of universal jurisdiction - I say this very deliberately because the court has no credibility if it is not so-encouraged and if it is only taking up cases in countries where it does not have or if its policy of investigation and prosecution is determined by a desire, not to alienate important state parties such as UK and not to alienate prospective future state parties. So, the fate of universal jurisdiction will finally depend on whether the ICC will be given a fair chance of taming international power politics by shielding judicial proceedings from state interference whether of unilateral or multilateral nature. Much will depend on the ratification of the Rome Statutes by major powers from all continents, but also on the goodwill of those states that has already ratified the Statutes.

Being the embodiment of supranational ideal of global justice, universal jurisdiction must face the realities of unipolar international order. The lack of a global balance of power has already seriously undermined the legitimacy of the UN organization and hampered its ability of multilateral action. This state of affairs may be considerably more detrimental to the nascent system of supranational law enforcement on the basis of this notion of universal jurisdiction. I have called in another context that the direct relationship of power politics and law has proven to be the most intricate issue of the domestic rule of law. It is infinitely more complex and complicated when the norms of *jus cogens* of international law are eventually to be enforced against the most powerful international actors in this highly fragile framework of universal jurisdiction.

7.4 The limits of exercise of universal jurisdiction

The subject under discussion is one of the most controversial areas in international criminal jurisprudence. In an area of law where most principles are very heavily contested, it takes something to occupy the position of a concept, the very existence of which is still being debated by academicians and scholars; and I do not propose to enter into that debate; I think people have tried to do that

but which limited success. So, what I am going to do here is what is called the philosophers' trick and assume that universal jurisdiction can be exercised and that I am going to try and flush out its limits by focusing on a particularly controversial aspect of that, which is the exercise of absolute universal jurisdiction. The absolute universal jurisdiction, the way it has been defined is essentially the exercise of universal jurisdiction, which requires absolutely no link with the state that exercises the jurisdiction including the presence of the accused in the territory of the foreign state.

The entire concept has a fairly tortured history in terms of its understanding by academics and courts, which explains my current Endeavour to try and explain the concept and I immediately am sympathetic about it. So, being a lawyer and, therefore, being naturally obsessed with definitions, I am going to start off with trying to define what I think is absolutely universal jurisdiction and what it is about.

The confusion, which surrounds the concept itself, is this. I think, it is most heavily encapsulated in the separate opinion of the Judges Higgins, Koijma and Burgenthal, in the famous case, where they say, at what point of time, is the presence of the accused in the territory of the foreign state required, is it at the time of the commission of the offence, is it at the time of the issuance of arrest warrants, is it at the time of the trial itself, I think, this question reflects the amount of confusion that is inherent in understanding the concept of universal jurisdiction and the way it is exercised. Because most commentators tend to treat absolute universal jurisdiction as a separate category of universal jurisdiction. There is something called universal jurisdiction which is to exercise jurisdiction over a person who has no connection with the state, over crimes which have no connection with your state, your state has not have any particular interest in prosecuting the person, except the fact that this is an international crime and therefore, it mandates universal jurisdiction. Then, there is something called universal jurisdiction which is absolute, which does not even require his presence in your territory, when you are exercising that jurisdiction.

That is where the problem of confusing something like prescriptive jurisdiction in international law and enforcement jurisdiction in international law comes in because prescriptive jurisdiction in international law is simply the act of making the law of your state applicable to certain acts or events that have taken place and enforcement jurisdiction on the other hand is something that involves you actually making your law applicable to them in the sense of being able to make them subject to your state's criminal process and all the wonderful things that states do to actually bring people to justice.

When you talk about universal jurisdiction it is, by definition, prescriptive jurisdiction, which is that you are making your state's law applicable to a person who has not connection with it to a crime, which has not happened in your state. There is absolutely no connection, except the nature of the crime. Then, where you choose to condition the exercise of that jurisdiction on something like having the presence of the accused in your territory while exercising the jurisdiction - it becomes a procedural matter. It has got nothing to do with the act of prescription. Whether you choose to have that as a procedural requirement, is a matter for your domestic law. It has got nothing really to do with whether universal jurisdiction in international law recognizes that or not.

So, to answer the question that is posed by the separate opinion, is the presence of the accused was required at the time of commission of the offence, it would be a case of exercising territorial jurisdiction because prescriptive jurisdiction by nature has to be exercised, when it is asserted and not when it is exercised in the sense of enforced. Is the presence of the accused was required at the time of issuing an arrest warrant, that will be again a question of procedure for the domestic law of your state, and not a question of international law. Is his presence was required at the time of the trial, then, that would be a matter for enforcement jurisdiction; then again, it is a matter for your state, whether it permits trials in absentia, or not, etc. and so, you could possibly exercise jurisdiction in the sense of have a trial in absentia.

So, once we recognize that there is this difference and the fact that universal jurisdiction prescriptive absolute universal jurisdiction to use his term, is permissible in international law, then the question about whether international law recognizes the exercise becomes little different. The separate opinion again says that international jurisdiction, universal jurisdiction in absentia is unknown to conventional international law. But it is not quite as simple as that. The question that needs to be answered is that assuming that we do recognize universal jurisdiction, can the exercise of it ever be conditional upon having the accused in your territory? Whether that has an impact on the act of prescription ? The answer is no; it says, even if your enforcement jurisdiction is something that is territorial in nature and requires the consent of the other state, that has no bearing on the act of prescription which can be territorial in nature and that is proof by the more traditional way of exercising jurisdiction, such as nationality, personality, which have nothing to do with territoriality.

The distinction has been recognized though implicitly in several recent cases, in fact - it is recognized by the recently managed constitutional court's decision which came out in October on universal jurisdiction. The issue was relating to the Guatemalan civil war; the then Guatemalan regime had committed several acts of atrocities on people who were not connected with Spain and the question before the Spanish Constitutional Court was, can the court exercise jurisdiction over these people, even though they were not present on Spanish territory. The Spanish Constitutional Court answered in the affirmative. Based upon the reasoning that as far as universal jurisdiction is concerned, you can ask, while exercising the jurisdiction, you can ask for extradition procedures, you can get the accused on your territory. But all this has no bearing whether in the first place, your law by prescription can provide for universal jurisdiction to be exercised, regardless of any other hierarchical limits or procedural limits or subsidiary in the prescription of universal jurisdiction.

Germany is another state which is very proactive in this matter. The German International Court of Crimes again recognizes that the presence of the accused or any link is by definition unnecessary for the exercise of universal jurisdiction.

So, what are the reasons? We might still say that you must require the presence of the accused in the territory; there can be several pragmatic or political reasons, though not legal, theoretical reasons. The dramatic instrument of that is provided by Belgium. Belgium, initially in its law, did not require any link at all with the states when it was exercising jurisdiction; therefore, when they went ahead and issued arrest warrants against Sharon, issued arrest warrants against George Sharlagusthinia. The US was a little unhappy with the fact and so, they said that you must do something about your law, you cannot just go on issuing arrest warrants against these people.

So, Belgium amended its law under tremendous pressure from the US. The US was still not happy because the Generals were still being subjected to prosecution in Belgium. So, they said that we will shift the NATO headquarter out, if you do not do something about it. So, Belgium went ahead and it had to amend its laws and say that now we require the link of residence on nationality. You cannot just go ahead and exercise jurisdiction in absentia. These can be very practical and policy reasons, I guess, for a state, in order to limit its jurisdiction and say that we have required the presence of the accused in our territory.

These have really nothing to do with legal, theoretical basis of exercise of universal jurisdiction, which by definition would always be in absentia, till the point at which it is exercised. So, if we look at legal theoretical terms, there is nothing special, despite the controversy it invited about universal jurisdiction in absentia. Its exercise can always be conditioned because of policy reasons, because of political reasons on having the accused in your territory. Even those reasons usually have to do things like gathering evidence; there are international relations, their precautions. All these reasons can be much better addressed by limiting the exercise of universal jurisdiction in a different way, and not having the procedural requirements saying that the accused need to be on your territory.

The different ways probably to provide for subsidy add to the universal jurisdiction, which is that when you recognize a state which has a closer link with the crime in question or the offender in question, is willing and able to exercise

jurisdiction, you give priority to that state - again, not for any theoretical reasons connected with universal jurisdiction per se, but for political and pragmatic reasons that take into account the reasons that people have been opposing the exercise of universal jurisdiction in absentia.

7.5 The principle of universality : A critical Evaluation

Let me begin with a question as to the exercise of universal jurisdiction and its effectiveness. First and foremost, it is related to the crimes of universal jurisdiction. There are certain crimes in the international field; there are certain crimes that are considered to be international in content. In the sense that it varies from one state to another; it goes and it passes from one state to another and hence, various states elements are involved and hence, they call it 'international component is involved in that'. Next comes the concept of official capacity. National legislatures should ensure that national courts can exercise jurisdiction over anyone suspected or accused of heinous crimes under international law. Whatever the official capacity of the suspect or the accused at the time of alleged crime or anytime thereafter. This is with reference as to the indispensable nature and kind of the universal jurisdiction principle, which every court in law should take into account.

With respect to the retrospective effect and time limit, as well as the national or the political influence or interference, the guarantee in fair trials as also with respect to death penalty or punishment, the cruel or inhuman degrading punishments, national legislation should ensure that grave crimes under international law are not punishable by death penalty or other cruel inhuman degrading punishment. As to the issue in question, we see in reality as well as in practice, it remains still unclear as the states or the members in international community of nations have different stance and points of view in taking the treatment of crime as well as criminal.

The international cooperation, as well as investigation in the prosecution, as well as the process involved in that, the states must fully cooperate with investigations and the prosecution by the competent authorities of other states, exercising

universal jurisdiction over grave crimes under international law, regarding effective training of judges, prosecutors, investigators and defence lawyers, national legislation should ensure that judges, prosecutors, investigators receive effective training in this particular branch of law. So, with this, the exercise of universal jurisdiction becomes very clear that the universal jurisdiction which is an important component in the international administration of justice, particularly with respect of the criminal justice system, these are the various outlines, the broad themes that have to be taken into consideration while looking at enforcing it.

With respect to justification, what type of justification is there, is there any justification for universal jurisdiction as such, despite the acts of genocide crimes against humanity, war crimes and cases of torture, since the end of the Second World War, only a handful of individuals have been brought to the fore. In this instance, we see why such a justification is very essential and how are we going to go about that. One of the fundamental and foremost reasons is the state's failure to act. Some states fail to act; the reasons being that they fail to fulfill their obligations to bring those responsible for the grave crimes in international law to justice. Often courts in the states where crimes occurred are unable to exercise jurisdiction because the territorial state has not yet enacted the necessary legislation. The crimes under international law or crimes under national law, are such that the legislation that they have is inadequate.

Again we see that even when the territorial state has fulfilled its international obligations, to enact such a legislation, there are a number of reasons why prosecutors and investigation judges may fail to act. The entire legal system might have collapsed; or we see that the courts could be functioning, but they may be incapable of bringing those responsible to justice, for reasons such as lack of resources or inability to provide security for suspects, victims, witnesses, etc. Again, in another context we see that the absence of ICC, the limits and its scope as to its jurisdiction which we are discussing, the community will continue to rely on national prosecutions since it is unlikely and perhaps undesirable. It

would be unable to handle all the cases that there were ever would be an ICC with exclusive and comprehensive jurisdiction over crimes in international law.

In this context, we have seen a particular quotation given by Mr. Phillippe, the President of ICC, which says : "It must be understood that no one expects the ICC on its own to deter all crimes; the ICC must be a part of a framework of measures to sustain a culture of accountability, including increased domestic prosecution of such crimes, greater use of universal jurisdiction and greater cooperation in suppressing international crimes". Then, we look into the justification, being that the catalyst for action by territorial states, in which a prominent international human rights lawyer explained: after the event of the impact of arrest in London of the former President of Chile, previously the Chilean Judges began looking for chinks in the dictator's legal armour. After decades of silence, the former collaborators stepped forward to tell of his role in covering up atrocities, revelations that have had a snowball effect. The number of criminal cases against him jumped into dozens and hundreds, by the time the British Home Secretary, Jack Straw sent a note to him, ostensibly on health grounds, which was later on revealed, the myth of his immunity has been totally shattered. The last justification that we have for the exercise of universal jurisdiction is this. IK again quote from a US Special Rapporteur on Extra-Judicial Territorial content, in 1993, he has said that lessons should be drawn from the past and the cycle of ethnic violence that has drenched both Burundi and Rwanda in blood must be broken. To this end, the impunity of perpetrators of the massacres must be definitely brought to an end and preventive measures to avoid the recurrence of such tragedies must be designed.

While looking into the deterrence aspect, we see the effectiveness of the deterrence is likely to depend firstly on factors applicable to the repression of the crimes such as the certainty of arrest, prosecution and conviction, the severity of punishment and the amount of reparation. Secondly, it is on special factors related to jurisdiction. In this context, the effectiveness of deterrence, at the international level is so difficult to document and yet, we have not seen a proper documentation on this particular aspect. But various scholars have said

something on this that this is an effective deterrence. With respect to the other approaches to universal jurisdiction I have got into the international legal order, from the perspective of international law. Scholar F A M Man sighted that the threat to the international legal order as providing a rationale for universal jurisdiction over crimes under international law. He said and I quote; the second exception to the general rule that states do not have criminal jurisdiction over crimes committed by aliens abroad arise from the character of certain offences. This is such as to affect and therefore, justify, perhaps even compel every member of the family of nations to punish the criminal over whom the jurisdiction can in fact be exercised. These are crimes which are found in international law which the nations of the world have agreed, usually by treaty or to suppress which are thus recognized, not merely as acts, commonly treated as criminals but dangerous to, and indeed attacks upon the international order as such.

From the international community values' point of view, I again quote : This universality principle is based upon the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation, which as the custody of perpetrators, may punish them according to its law applicable to such offences'. From the national perspective - this is the last submission, which I have - I would like to quote this. This was argued during the parliamentary debates in The Netherlands, on the Bill to implement the Convention against torture, in support of the universal jurisdiction, and In quote : 'a shock wave would go through the Dutch legal order, if first with the presence in this country a foreign national recognized as a torturer by the witnesses and victims, the courts were to declare themselves incompetent to hear in this case.' The last but not least, in conclusion, I would say that certain crimes are invariably considered or accepted and regarded in international law as to threaten the very international peace and security; indeed, the International Law Commission has consistently treated the crimes of genocide, crimes against humanity and war crimes, as crimes which threaten international peace and security. The argument has its greatest force when the crimes are committed on a large scale or were they lead to cross-border refugees laws and conflicts, which may draw in other states'.

7.6 Jurisdictional powers of International Criminal Tribunals : From Nuremberg to Rome and beyond

I have identified four issues for the purpose of studying the problem at hand, which are controversial. The first issue relates to temporal powers of the International Criminal Tribunals. The second is the territorial jurisdiction. The third is the relationship between international criminal tribunals and domestic courts. The fourth is the relationship between the Security Council and the International Criminal Tribunals. Let me begin by looking at the first issue, that is 'temporal powers of tribunals'. All of us know that there is the principle of 'nullum crimen sine lege'. You cannot have criminal laws ex post facto. This was one of the major criticisms that arose in the context of Nuremberg. In Nuremberg this principle seems to have been violated because the Nazis were tried for crimes, which were not really defined as such, before the Charter of London. The justification for this was basically given on three grounds : one, it was said that this rule was not a rule of law, it is rule of equity or justice which really cannot be enforced and so, you cannot say that this principle had been violated. The second thing that was said was that as per the Kellogg Bri- and Pact of 1928, Japan and Germany had agreed that all disputes between them and other countries will be resolved by peaceful methods and they will not resort to war and hence, since they resorted to war now, they have been in violation of that and also that they have signed a number of conventions between 1928 on a variety of those issues, and hence, they were bound by them - though there were no penal provisions in any of these conventions that they had signed, yet the fact that it was defined that you cannot do something like this, it was taken as a justification to punish the offenders. The third argument was that of the natural law. You cannot say that something does not exist. God has given all these things earlier. So, even before the Ten Commandments came about, 1600 years before that, there had been situations where God had punished the offenders of the laws that he had laid down and hence, you can really see that there is no argument against doing something like this. If you do not punish people who have violated the rights of so many people during these wars, it will really be unfair and go against the natural law. The arguments against this argument are two. One was,

as Germans said, that the Charter of London is what laid down the things as crimes and hence you could not possibly prosecute people for things that were not defined as crimes. The second is that they tried to counter the fact that various treaties that had been signed, saying the circumstances are such that you cannot really require the states to follow these principles because they are now in the state of war. Because of these two principles, you cannot really exercise jurisdiction over these states.

Coming to the International Criminal Tribunal for Yugoslavia and Rwanda, they were not really such a problem because of the situation there- because Yugoslavia and Rwanda had signed most human rights conventions and also had incorporated them into the national laws, because of which there was not really a problem with respect to prosecution. But again, there are three arguments that come up here. The first was that this is an internal armed conflict and not an international conflict and so, can you really use chapter VII of the UN Charter and can you set up an international tribunal ? That was the argument. That was rebutted by saying that this is not really an international conflict; there are shades of international armed conflict in this because of which the Security Council can act. The second argument was the same - what I said in the context of Nuremberg - that is, no penal element in any of the treaties that have been signed by the two nations is there.

In the context of the ICTY, What it did was that the Statute refers to domestic laws which I spoke about earlier and hence that problem is also taken care of. The third but not really a tenable argument is the fact that tribunals are set up after the offences were committed, which is not tenable and you cannot say that the court should exist at that time. That again cannot be insisted upon really.

In the context of the ICC, it becomes quite clear because the Rome Statute says that only after 1 July 2002, whatever crimes are committed, can be tried by the ICC. But there are a couple of problems there. Firstly, there is a situation where a state can become a signatory to the Statute and ratify it. If that is done, look at Articles 22 and 24, which reiterates this principle of temporal jurisdiction. There is

a possibility that if the state ratifies the Statute, then there is a period of time, in which you cannot prosecute situations and this can be effectively used to shield people who have committed crimes. That is one problem. The second is a situation of a non-party state, accepting jurisdiction with respect to an individual, also from other non-party states, for crimes committed within its territories. So, that could be used for political motives where you accept the jurisdiction just for prosecuting a person.

In the context of the Iraqi Special Tribunal, it seems that victor's justice is being re-visited because of the fact that it says that temporal jurisdiction extends from 17 July 1968, when the B'aath Party came to power, till 1 May 2003, when UN took effective control; so, it means prosecuting Saddam Hussein and the rest of the people for things that were not crimes at that point of time.

Coming now to the issue of territorial jurisdiction, there is one interesting principle that arises in this context is that of delegated territorial jurisdiction. The argument that every state has a territorial jurisdiction which is recognized, what has been done in the Rome Statute, when the referral is made is that this territorial jurisdiction is delegated to the ICC. You can counter this by saying that the entire argument for territorial jurisdiction is that has taken place there.

If you are going to delegate this really, it does not make sense. The other issue is, is there any other state practice in this regard. If you look at European Convention on Transfer of Criminal Proceedings that is one place where you find something like this happening, but there again, you cannot really bind states; you cannot bind nations or states which have not consented to their nationals being tried before any other tribunal. This is exactly what is happening here because even if a person from a non-party state is tried before the ICC and if the state does not consent, it does not make really any difference. So, delegated territorial jurisdiction cannot really be used as an argument.

In the context of the next issue, which is relationship between domestic courts and international tribunals, we see a new system which has been brought about within the Rome Statute which is of complementarity. The doctrine of

complementarity says that the ICC will not prosecute an offence if it is ably tried by domestic courts and hence, in such a situation, its primacy is given to domestic courts over international tribunals. In the ICTY and ICTR, the primacy was given to the tribunal itself. The doctrine of complementarity seeks to say that the ICC is a safety net which is trying to stop any sort of impunity. In this context, there are three issues. Firstly we have complementarity and truth commissions. We have situations of truth commissions coming up. Does that really mean that states have effectively prosecuted these people and shielding the offenders or there is no punishment as such, if the truth commission happens to give award, what will happen, in the context of South Africa or in the context of what happened in Sierra Leone when amnesty provisions were utilized. That is one situation that you might have to look at.

There second is something that India rests on - complementarity in the context of Article 13 (b). One of India's reasons for not really signing the Rome Statute seems to have been that if there are situations, because of political reasons, the ICC, might take up situations of alleged human rights violations in India. That is something that can be done now because if you use Article 13(b) and the Security Council does happen to refer any such situation to the ICC, the doctrine of complementarity does not apply to Article 13(b), and hence, there is no question of domestic court really being able to say that, we have effectively prosecuted and you cannot take over this issue.

Lastly, I will deal with the powers of the Security Council in International Criminal Tribunals. The argument that first comes up is chapter VII? Chapter VII does not talk about setting up of tribunals and so, can you really set up tribunals under Chapter VII ? The referrals under Rome Statute where the Security Council can refer, seem to be curtailed to a certain extent, which limits the powers of Security Council because of the fact that even if it is referral, the court can even go into the issue of whether there is actually a situation which has arisen, so, it limits that to a certain extent. That has already been just discussed. The power of referral really takes all this away because what are you doing with the power of referral ? You are recognizing and seem to indicate the ICC is subordinate to the UN

Security Council and the UN Security Council can ask the ICC to stop proceedings, which in fact, has been done earlier in the context of US soldiers. So, in this context, we can see that the Security Council is still playing a controversial role with respect to its relationship with the International Criminal Tribunals.

7.7 The Princeton Principles of Universal Jurisdiction

CHAPTER 8

EXERCISE OF UNIVERSAL JURISDICTION: JURISDICTIONAL ISSUES

When Sulaiman Al-Adsani traveled from the United Kingdom to Kuwait to repel Saddam Hussein's invasion in 1991, he never dreamed he would depart with bruises and burns inflicted by the very government he had sought to defend. According to Al-Adsani,⁴⁸⁸ his troubles began when he was accused of releasing sexual videotapes of Sheikh Jaber Al-Sabah Al-Saud Al- Sabah, a relative of the emir of Kuwait, into general circulation. After the first Gulf war, with the aid of government troops, the sheikh exacted his revenge by breaking into Al-Adsani's house, beating him, and transporting him to a Kuwaiti state prison, where his beatings continued for days. Al-Adsani was subsequently taken at gunpoint in a government car to the palace of the emir's brother, where his ordeal intensified. According to Al-Adsani, his head was repeatedly submerged in a swimming pool filled with corpses and his body was badly burned when he was forced into a small room where the sheikh set fire to gasoline-soaked mattresses.

Following his return to the United Kingdom, Al-Adsani brought suit against the government of Kuwait in England's High Court seeking damages for the physical and psychological injury that had resulted from his alleged ordeal in Kuwait.⁴⁸⁹ The court dismissed the suit for lack of jurisdiction, holding that Kuwait was entitled to foreign state immunity under the UK State Immunity Act, 1978.⁴⁹⁰ Al-Adsani then appealed the decision to the English Court of Appeal but again lost on grounds of state immunity.⁴⁹¹

After Al-Adsani was refused leave to appeal by the English House of Lords, he filed an application with the European Court of Human Rights (ECHR), arguing

⁴⁸⁸ The summary of ill-treatment that follows derives from Al-Adsani's allegations in his case before the European Court of Human Rights. *Al-Adsani v. United Kingdom*, App. No. 35763/97, paras 9–13 (Nov. 21, 2001), *available at* <<http://www.echr.coe.int/eng/judgments.htm>> [hereinafter ECHR Judgment]. The accuracy of these allegations has not been proven in a court of law.

⁴⁸⁹ *Al-Adsani v. Kuwait*, 103 ILR 420 (Q.B. 1995).

⁴⁹⁰ State Immunity Act, 1978, c. 33 (UK), *reprinted in* 17 ILM 1123 (1978).

⁴⁹¹ *Al-Adsani v. Kuwait*, 107 ILR 536 (C.A. 1996).

principally that the United Kingdom had failed to protect his right not to be tortured and had denied him access to legal process.⁴⁹² Al-Adsani again lost, but he convinced many of the Court's judges to advocate an increasingly popular legal theory, the "normative hierarchy theory," aimed at challenging seemingly unjust outcomes such as these. Under the normative hierarchy theory, a state's jurisdictional immunity is abrogated when the state violates human rights protections that are considered peremptory international law norms, known as *jus cogens*.⁴⁹³ The theory postulates that because state immunity is not *jus cogens*, it ranks lower in the hierarchy of international law norms, and therefore can be overcome when a *jus cogens* norm is at stake. The normative hierarchy theory thus seeks to remove one of the most formidable obstacles in the path of human rights victims seeking legal redress.⁴⁹⁴

The recent emergence of the normative hierarchy theory on the international law scene has sparked significant controversy among jurists and publicists. The ECHR's treatment of the issue in *Al-Adsani v. United Kingdom* exemplifies the

⁴⁹² The claimant alleged, inter alia, a violation of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 222. ECHR Judgment, *supra* note 1, para. 3.

⁴⁹³ "*Jus cogens* is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom. Usually, a *jus cogens* norm presupposes an international public order sufficiently potent to control states that might otherwise establish contrary rules on a consensual basis." MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62–63 (4th ed. 2003); *see also* AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 57–58 (Peter Malanczuk ed., 7th rev. ed. 1997); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 514–17 (5th ed. 1998) [hereinafter BROWNLIE (5th)]; 1 OPPENHEIM'S INTERNATIONAL LAW 512–13 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). *Jus cogens* is a concept with a long lineage, whose most significant modern manifestation is Article 53 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331. Article 53 establishes the rule that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." A "peremptory norm," also known as *jus cogens*, is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." *See* CHRISTOS L. ROZAKIS, THE CONCEPT OF *JUS COGENS* IN THE LAW OF TREATIES (1976); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 203 (2d ed. 1984); JERZY SZTUCKI, *JUS COGENS* AND THE VIENNA CONVENTION ON THE LAW OF TREATIES (1974); 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 327 (Rudolf Bernhardt ed., 1984).

⁴⁹⁴ While examples of the stymying effect of foreign state immunity on human rights claims abound, a prototypical case is found in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), in which the plaintiff, who alleged that he had been tortured by Saudi government officers, was barred from suing Saudi Arabia in U.S. court on account of the government's foreign sovereign status. *See also* Bouzari v. Islamic Republic of Iran, No. 00–CV–201372 (Ont. Sup. Ct. J. May 1, 2002) (on file with author) (claims of torture barred by Canadian State Immunity Act).

spirited debate.⁴⁹⁵ While recognizing that the prohibition of torture possesses a “special character” in international law, the ECHR rejected the view that violation of such a norm compels denial of state immunity in civil suits.⁴⁹⁶ However, the verdict evoked opposing commentary on the normative hierarchy theory from various ECHR judges.⁴⁹⁷ On the one side, Judges Matti Pellonpää and Nicolas Bratza concurred with the decision and renounced the theory on practical grounds. They reasoned that if the theory were accepted as to jurisdictional immunities, it would also, by logical extension, have to be accepted as to the execution of judgments against foreign state defendants, since the laws regarding execution, like state immunity law, are arguably not *jus cogens* either.⁴⁹⁸ Consequently, acceptance of the normative hierarchy theory might lead to execution against a wide range of state property, from bank accounts used for public purposes to real estate and housing for cultural institutes, threatening “orderly international cooperation” between states.⁴⁹⁹

On the other side, Judges Christos Rozakis, Lucius Caflisch, Luzius Wildhaber, Jean-Paul Costa, Ireneu Cabral Barreto, and Nina Vajie dissented and advocated resolution of the case on the basis of the normative hierarchy theory. They wrote: “The acceptance... of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.”⁵⁰⁰ Thus, the minority concluded that Kuwait could not “hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction.”⁵⁰¹

⁴⁹⁵ For a detailed summary of the decision, see Marius Emberland, Case Report: *McElhinney v. Ireland, Al-Adsani v. United Kingdom, Fogarty v. United Kingdom*, in 96 AJIL 699 (2002).

⁴⁹⁶ ECHR Judgment, *supra* note 1, para. 61.

⁴⁹⁷ The Grand Chamber presiding over the proceedings was composed of seventeen judges.

⁴⁹⁸ ECHR Judgment, *supra* note 1, Concurring Opinion of Judges Pellonpää and Bratza.

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*, Dissenting Opinion of Judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto, and Vajie

⁵⁰¹ *Id.*

The difference of opinion in the *Al-Adsani* case foreshadows the coming theoretical clash regarding the most appropriate and effective means of enforcing human rights law against foreign states in national proceedings. Since its inception just over a decade ago, the normative hierarchy theory has amassed notable support among scholars and jurists alike. Despite its growing popularity, however, the theory has never been comprehensively tested.⁵⁰² To attempt to fill this void, this article offers a critical assessment of the normative hierarchy theory and concludes that the theory is unpersuasive because it rests on false assumptions regarding the doctrine of foreign state immunity.

The doctrine of foreign state immunity, like most legal doctrines, has evolved and changed over the last centuries, progressing through several distinct periods.⁵⁰³ The first period, covering the eighteenth and nineteenth centuries, has been called the period of absolute immunity, because foreign states are said to have enjoyed complete immunity from domestic legal proceedings.⁵⁰⁴ The second

⁵⁰² There is limited criticism of the theory. In *Al-Adsani*, Judges Pellonpää and Bratza focused primarily on its potentially damaging impact on international relations, *see* text at note 12 *supra*. In *Prefecture of Voiotia v. Federal Republic of Germany*, a minority on the Hellenic Supreme Court criticized the theory because of its unproven status in international law. *Prefecture of Voiotia v. Fed. Republic of Germany*, No. 11/2000 (Areios Pagos [Hellenic Sup. Ct.] May 4, 2000) [hereinafter Greek Judgment II]; *see* text at notes 216–23 *infra*. In addition, one commentator pointed out that the theory is inherently contradictory in that it presupposes an implied waiver of immunity in cases in which a foreign state would never be likely to consent explicitly to waive immunity. JÜRGEN BRÖHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS 191 (1997); *see also* HAZEL FOX, THE LAW OF STATE IMMUNITY 523–25 (2002) (raising interesting general questions about the relationship between *jus cogens* and state immunity). Unfortunately, the International Law Commission’s work on codifying the law of foreign state immunity has not addressed the theory in detail. *See* Report of the Working Group on Jurisdictional Immunities of States and Their Property, UN Doc. A/CN.4/L.576, annex, at 58 (1999) (noting that the draft articles on jurisdictional immunities of states and their property do not address the effect of a *jus cogens* violation).

⁵⁰³ For a general overview of the development of the doctrine, *see* GAMAL MOURSI BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 9–62 (1984); THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION 26–102 (1970); JOSEPH M. SWEENEY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY (Policy Research Study, U.S. Dep’t of State, 1963).

⁵⁰⁴ Indeed, in the nineteenth century national courts applied the rule of immunity rather broadly. *See* The Parlement Belge, [1880] 5 P.D. 197, 217 (finding that “each and every one [state] declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign”); *Spanish Gov’t v. Lambège et Pujol*, Cass., D. 1849, I, 5, 9 (finding that “a government cannot be subjected to the jurisdiction of another against its will, and that the right of jurisdiction of one government over litigation arising from its own acts is a right inherent to its sovereignty that another government cannot seize without impairing their mutual relations”); *see also* BARRY E. CARTER, PHILLIP R. TRIMBLE, & CURTIS A. BRADLEY,

period emerged during the early twentieth century, when Western nations adopted a restrictive approach to immunity in response to the increased participation of state governments in international trade.⁵⁰⁵ This period was marked by the development of the theoretical distinction between *acta jure imperii*, state conduct of a public or governmental nature for which immunity was granted, and *acta jure gestionis*, state conduct of a commercial or private nature for which it was not.⁵⁰⁶ This distinction rested on the growing notion that the exercise of jurisdiction over *acta jure gestionis* did not affront a state's sovereignty or dignity. Since applying the public/private distinction proved difficult for many courts,⁵⁰⁷ some states, particularly the common-law countries, developed a functional variation on the restrictive approach in the 1970s and 1980s, replacing that hazy distinction with national immunity legislation.⁵⁰⁸

One of the more vexing topics in international law, state immunity is fraught with complexity and uncertainty, which the normative hierarchy theory does not adequately address. The theory operates conceptually on the international law level, as one norm of international law, *jus cogens*, trumps another, state immunity, because of its superior status. The theory thus assumes that state immunity in cases of human rights violations is an entitlement rooted in international law, by virtue of either a fundamental state right or customary international law. However, both assumptions are false. State immunity is not an absolute state right under the international legal order. Rather, as a fundamental

INTERNATIONAL LAW 547 (4th ed. 2003); Lakshman Marasinghe, *The Modern Law of Sovereign Immunity*, 54 MOD. L. REV. 664, 668–78 (1991).

⁵⁰⁵ See RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 140–41 (1964); Peter D. Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RECUEIL DES COURS 235, 266–67 (1986 V).

⁵⁰⁶ Establishing the line between immune and nonimmune state conduct has proven to be a vexing task. See Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 267–70 (1982). See generally James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 1983 BRIT. Y.B. INT'L L. 75.

⁵⁰⁷ See, e.g., *Ibrandtsen Tankers v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (“The proposed distinction between acts which are *jure imperii* (which are to be afforded immunity) and those which are *jure gestionis* (which are not), has never been adequately defined, and in fact has been viewed as unworkable by many commentators.”).

⁵⁰⁸ For example, the U.S. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602–1611 (2000), and the UK State Immunity Act, 1978, *supra* note 3, were products of this movement.

matter, state immunity operates as an exception to the principle of adjudicatory jurisdiction.⁵⁰⁹ Moreover, while the practice of granting immunity to foreign states has given rise to a customary international law of state immunity, this body of law does not protect state conduct that amounts to a human rights violation. These realities yield the important conclusion—one that the normative hierarchy theory ignores—that, with respect to human rights violations, the forum state, not the foreign state defendant, enjoys ultimate authority, by operation of its domestic legal system, to modify a foreign state’s privileges of immunity.⁵¹⁰

This article, while critiquing the normative hierarchy theory, establishes a solid theoretical foundation on which human rights litigation can proceed. The theory of restrictive immunity, adopted by most states, draws the line between immune and no immune state conduct roughly in accordance with the public (*imperii*)/private (*gestionis*) distinction. However, the original aim of state immunity law was to enhance, not jeopardize, relations between states. This article contends that international law requires state immunity only as to state activity that collectively benefits the community of nations. Thus, where state conduct is clearly detrimental to interstate relations but still protected by domestic state immunity laws, the restrictive approach is inconsistent with the strictures of international law and should be amended. The most obvious example of this kind is where state immunity bars claims against a foreign state brought in a forum state for the murder, torture, or victimization of citizens of the forum state. In such circumstances, foreign states are afforded immunity protections solely as a

⁵⁰⁹ Courts have made this assertion before, but with insufficient explanation. *See, e.g.,* *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

⁵¹⁰ It must be emphasized that this conclusion is possible to reach because the field of foreign state immunity has not been occupied completely by international law. *See* “The Status of State Immunity in Relation to International Law” *infra*. In other areas of immunity law, however, this may not be the case. For example, the field of diplomatic and consular immunities is clearly occupied primarily by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, confirming its international law character. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, 500 UNTS 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, 596 UNTS 261. In the recent decision in *Arrest Warrant of 11 April 2000*, the International Court of Justice (ICJ) held, after assessing various international agreements, that incumbent heads of state also enjoy immunity as a matter of customary international law. *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.) (Int’l Ct. Justice, Feb. 14, 2002), 41 ILM 536 (2002) [hereinafter *Arrest Warrant*], available at <<http://www.icj-cij.org/icjwww/idecisions.htm>>. *But see* Dissenting Opinion of Judge Van den Wyngaert, *id.* at 622 (disagreeing with the Court’s conclusion because there is neither treaty law nor customary international law directly on point).

matter of domestic law and their entitlement to immunity is revocable on the basis of the forum state's right to exercise adjudicatory jurisdiction over the dispute.

Some have observed that the doctrine of foreign state immunity is poised on the cusp of another period of doctrinal development—one in which a further restriction of immunity will accrue in favor of human rights norms.⁵¹¹ Such an advancement is welcome. However, it should proceed not on the basis of the normative hierarchy theory, which fails to reflect the true nature and operation of the doctrine of foreign state immunity, but, rather, on the basis of a theory of collective benefit in state relations.

The normative hierarchy theory proceeds on the assumption that state immunity in cases of human rights violations is an entitlement of states that derives from international law.⁵¹² Indeed, the centerpiece of the theory is a proposed hierarchy of international legal norms, which resolves the conflict between *jus cogens* and state immunity in favor of the former. This hierarchy, quite clearly, operates on a purely international level under the theory that the core interests of the community of states, enshrined in *jus cogens*, outweigh the individual interests of any one state, i.e., immunity from foreign domestic proceedings. As at present there is no universally accepted multilateral treaty to govern state immunity law,⁵¹³ the normative hierarchy theory must rest on the assumption that state immunity is either the product of a fundamental principle of international law—a principle that arises from the very structure

⁵¹¹ See Richard Garnett, *The Defence of State Immunity for Acts of Torture*, 1997 AUSTL. Y.B. INT'L L. 97, 123–24; Hari M. Osafsky, 11 N.Y. INT'L L. REV. 35 (1998); Georg Ress, *The Changing Relationship Between State Immunity and Human Rights*, in *THE BIRTH OF EUROPEAN HUMAN RIGHTS LAW: STUDIES IN HONOUR OF CARL AAGE NØRGAARD* 175 (Michele de Salvia & Mark E. Villiger eds., 1998). But see ECHR Judgment, *supra* note 1, para. 66 (“[W]hile noting the growing recognition of the overriding importance of the prohibition of torture, it [is not] established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.”).

⁵¹² This aspect of the normative hierarchy theory is described in more detail in the text at notes 176–224 *infra*.

⁵¹³ The only such treaty is the European Convention on State Immunity, May 16, 1972, Europ. TS No. 74, 11 ILM 470 (1972) (entered into force June 11, 1976) [hereinafter European Convention], which, as of October 7, 2003, had only eight signatories.

of the international legal order—or a rule of customary international law.⁵¹⁴

8.1 State Immunity and Fundamental Principles of International Law

The original conflict of principles. The doctrine of foreign state immunity was born out of tension between two important international law norms—sovereign equality⁵¹⁵ and exclusive territorial jurisdiction.⁵¹⁶ The United States Supreme Court's decision in *The Schooner Exchange v. McFaddon*,⁵¹⁷ widely regarded as the first definitive statement of the doctrine of foreign state immunity, presents the classic example of this theoretical conflict.⁵¹⁸ In 1812, while sailing off the

⁵¹⁴ As the law of state immunity is largely uncoded on the international level, this article dwells primarily in the area of the second established source of international law listed in Article 38(1) of the ICJ Statute, international custom. Within that area, this article draws the same distinction that Professor Lauterpacht has drawn between the law of state immunity as it relates to fundamental principles of international law and to international custom. See generally Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 1951 BRIT. Y.B. INT'L L. 220. The first concept relates to a principle of international law that arises from the very structure of the international legal order, in this case the principle of sovereign equality. The second concept concerns a rule of international law whose creation is the product of prevailing international custom among states.

⁵¹⁵ Applying the test proposed by Professor Schwarzenberger, the principle of sovereign equality is undoubtedly a fundamental principle of international law. He suggests that principles of international law may be considered fundamental if they meet the following criteria:

- (1) They must be exceptionally significant for international law; (2) they must stand out from others by covering a relatively wide range of issues and fall without artificiality under one and the same heading; (3) they must either form an essential part of any known system of international law or be so characteristic of existing international law that if they were ignored there would be a danger of losing sight of a characteristic feature of contemporary international law.

GEORG SCHWARZENBERGER & E. D. BROWN, A MANUAL OF INTERNATIONAL LAW 35 (6th ed. 1976). Article 2(1) of the United Nations Charter enshrines the principle of sovereign equality, reflecting its fundamental character. Many believe that the principle prevents one sovereign from exercising jurisdiction over another. Thus, the sovereign equality of states is often cited as the boilerplate explanation for the doctrine of foreign state immunity. See, e.g., RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 5 Introductory Note, at 390–91 (1987) [hereinafter RESTATEMENT].

⁵¹⁶ For a general discussion of the principle of territorial jurisdiction, see JANIS, *supra* note 6, at 318–20. The principle of exclusive territorial jurisdiction is commonly included under the rubric of “adjudicatory jurisdiction.” See RESTATEMENT, *supra* note 28, §421(2)(a) (jurisdiction to adjudicate exists in cases in which “the person or thing is present in the territory of the state, other than transitorily”).

⁵¹⁷ 11 U.S. (7 Cranch) 116 (1812).

⁵¹⁸ However, the doctrine pre-dates *The Schooner Exchange*, having originated in the period of monarchical rule in Europe. As Professor Giuttari explains:

Historically, the roots of sovereign immunity have been traced to the time-honored personal inviolability of sovereigns and their ambassadors when present or traveling in foreign countries. Considerations of concern and respect for the inviolable character and dignity of sovereigns had

American coast, a commercial schooner, the *Exchange*, owned by two citizens of Maryland, was seized by the French navy. By general order of the emperor Napoleon Bonaparte, the French navy converted the schooner into a ship of war.⁵¹⁹ When bad weather forced the *Exchange* into the port of Philadelphia, the original owners brought an *in rem* libel action against the ship for recovery of their property. The French government resisted the action, arguing that, as a ship of war, the *Exchange* was an arm of the emperor and was thus entitled to the same immunity privileges as the emperor himself.⁵²⁰

On appeal to the Supreme Court, Chief Justice John Marshall identified the theoretical dilemma at issue. On the one hand, he observed, international law dictated that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”⁵²¹ According to this long-established principle, the moment the *Exchange* entered U.S. territorial waters off the eastern seaboard, it became subject exclusively to the national authority of the U.S. government, an authority that encompassed the U.S. district court’s initiation of adverse legal proceedings against it.⁵²² On the other hand, Justice Marshall took notice of another fundamental principle of international law: that the world is composed of distinct nations, each endowed with “equal rights and equal independence.”⁵²³ This principle of sovereign equality, he believed, discouraged one sovereign from

their initial and major impact during the transition from the feudal era to the modern age when most states were ruled by kings and princes who “in a very real sense, personified the State.” In [such] a setting...., it was not difficult to understand the tendency to interpret the exercise of authority or jurisdiction on the part of one sovereign over another as indicative of hostility or a condition of inferiority that was incompatible with their dignity and independence.

GIUTTARI, *supra* note 16, at 7; *see also* CHARLES LEWIS, STATE AND DIPLOMATIC IMMUNITY 11 (1980).

⁵¹⁹ *The Schooner Exchange*, 11 U.S. at 122.

⁵²⁰ *Id.* at 126–27.

⁵²¹ *Id.* at 136

⁵²² Justice Marshall made perfectly clear that “[t]he jurisdiction of *courts* is a branch of that which is possessed by the nation as an independent sovereign power.” *Id.* This concept exists today in international law and is commonly referred to as “adjudicatory jurisdiction.” *See* RESTATEMENT, *supra* note 28, §421. The concept also exists as a subset of “prescriptive jurisdiction.”

⁵²³ *The Schooner Exchange*, 11 U.S. at 136.

standing in judgment of another, coequal sovereign's conduct.⁵²⁴ If the *Exchange* had been converted, as the French government argued, into an arm of the French emperor (and was thus a direct extension of his sovereignty), then the United States, as France's equal under international law, would be remiss in adjudging the ship's ownership through its courts. International law thus appeared simultaneously to grant the United States authority to adjudicate a dispute over property present within its territory and to prohibit the exercise of this jurisdiction because that property now purportedly belonged to a foreign government.⁵²⁵

The conflict of principles in *The Schooner Exchange* resulted directly from what Sompong Sucharitkul has described as "a concurrence of jurisdictions... over the same location or dimension."⁵²⁶ Normally, the principles of territorial jurisdiction and sovereign equality work individually-and often collectively-to promote order and fairness in the international legal system. The former serves to delineate each state's authority to govern a distinct geographical area of the world,⁵²⁷ while the latter guarantees to all states, regardless of size, power, or wealth, equal capacity for rights under international law.⁵²⁸ In *The Schooner Exchange*, however, these principles were at odds because two nations, the United States and France, asserted their sovereign "jurisdiction," or authority, to settle the dispute over the ship's ownership. The United States claimed the right to exercise jurisdiction because of the physical presence of the schooner in U.S.

⁵²⁴ *Id.* at 136–37.

⁵²⁵ In the end, Justice Marshall found that U.S. courts were barred from inquiring into the validity of title to the *Exchange* because the schooner was "a national armed vessel, commissioned by, and in the service of the emperor of France." *Id.* at 146.

⁵²⁶ Sompong Sucharitkul, *Immunities of Foreign States Before National Authorities*, 149 RECUEIL DES COURS 87, 117 (1976 I). Sucharitkul further describes such a concurrence as follows: "Contact between two States may result in a clash between two fundamental principles of international law, namely the principle of territoriality or territorial sovereignty, and the principle of the State or national sovereignty." *Id.*; see also THOMAS BURGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 216–17, 233–34 (3d ed. 2003).

⁵²⁷ "International law is based on the concept of the state. The state in its turn lies upon the foundation of sovereignty..." MALCOLM N. SHAW, INTERNATIONAL LAW 331 (4th ed. 1997). See generally Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373 (1995).

⁵²⁸ See generally EDWIN DEWITT DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW (1920).

territory.⁵²⁹ France, in stark contrast, argued that the conversion of the schooner fell within the ambit of the emperor's power and thus, by virtue of its sovereign character, could not be reviewed in U.S. courts.⁵³⁰

This clash of authority-and, in turn, that of the associated international law principles-is not confined to facts, such as those in *The Schooner Exchange*, that involve the straightforward transfer of sovereign property, such as a ship of war, to the territorial jurisdiction of another state.⁵³¹ Rather, the conflict arises any time a forum state seeks legitimately to exercise its right of jurisdiction under international law over a foreign state defendant, regardless of the physical location of the foreign state's representatives.⁵³² Thus, the most relevant example for this study arises when a plaintiff sues a foreign state in domestic proceedings for alleged human rights abuses that occurred outside the forum state.⁵³³ Here, too, the authority of the forum state to adjudicate the dispute, hereinafter referred to as "adjudicatory jurisdiction," is at loggerheads with the principle of sovereign equality.⁵³⁴ This disparity is usefully borne in mind because

⁵²⁹ The significance of the territorial connection between the defendant and U.S. territory was later crystallized in the well-known case *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁵³⁰ "[T]he rights of a foreign sovereign cannot be submitted to a judicial tribunal. He is supposed to be out of the country, although he may happen to be within it." *The Schooner Exchange*, 11 U.S. at 132 (arguments of U.S. Attorney General Pinkney in favor of dismissing the case on the basis of France's sovereign immunity).

⁵³¹ The concept that Justice Marshall cited as "territorial jurisdiction" refers to "authority over a geographically defined portion of the surface of the earth and the space above and below the ground which a sovereign claims as his territory, together with all persons and things therein." SCHWARZENBERGER & BROWN, *supra* note 28, at 74 (footnote omitted). This type of authority reflects only one aspect of the concept of jurisdiction, which in other manifestations may include the power to project state authority extraterritorially.

⁵³² Under modern principles of international law, a state's right of jurisdiction includes "particular aspects of the general legal competence of states... [such as] judicial, legislative, and administrative competence." BROWNLIE (5th), *supra* note 6, at 301.

⁵³³ See, e.g., *Nelson v. Saudi Arabia*, 507 U.S. 349 (1993); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994); *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

⁵³⁴ In cases of human rights abuses by foreign states, "adjudicatory jurisdiction" may rest on other principles of jurisdiction under public international law besides territoriality, including nationality, passive personality, the protective principle, and universality. For a discussion of the traditional bases of jurisdiction under public international law, see S.S. *Lotus* (Fr./Turk.), 1927 PCIJ (ser. A) No. 10 [hereinafter *Lotus* case]; RESTATEMENT, *supra* note 28, §454; Harvard Draft Convention on Jurisdiction

it means that the original clash of principles, as identified in *The Schooner Exchange*, and, more important, its resolution, as proposed by Justice Marshall and discussed below, provide a workable theoretical framework for resolving a wide range of current problems of state immunity. *Competing rationales and their implications for state immunity*. The doctrine of foreign state immunity emerged from the theoretical conflict described above. Two leading rationales explain the legal source of the doctrine.⁵³⁵ One asserts that state immunity is a fundamental state right by virtue of the principle of sovereign equality. The other views state immunity as evolving from an exception to the principle of state jurisdiction, i.e., when the forum state suspends its right of adjudicatory jurisdiction as a practical courtesy to facilitate interstate relations. Not surprisingly, these two rationales—like the principles of international law that they emphasize—find themselves in deep conflict. Moreover, each gives rise to vastly different implications for the nature and operation of the doctrine of foreign state immunity.⁵³⁶ The traditional starting point for the view that foreign state immunity is a fundamental state right is the maxim *par in parem non habet imperium*, meaning literally “An equal has

with Respect to Crime, 29 AJIL Supp. 439 (1935). While domestic state immunity laws are typically predicated on civil jurisdiction, traditional bases of criminal jurisdiction under public international law are most suitable where human rights violations are concerned. As Professor Bowett has argued, “where the civil jurisdiction of the State is an instrument of State policy, used as a means of exercising control over activities or resources in the interests of the State, then in principle such jurisdiction ought to be subject to the same governing rules of [public] international law.” D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 1982 BRIT. Y.B. INT’L L. 1, 4.

Within the legal systems of certain countries, domestic law limitations may limit the reach of a court’s jurisdiction under international law. In U.S. jurisprudence, it is debatable whether the Constitution’s Fifth Amendment requires that there be “minimum contacts” between the foreign state defendant and the United States, a precondition that would greatly limit U.S. courts’ ability to adjudicate human rights disputes. See *Tex. Trading & Milling Corp. v. Fed. Republic of Nig.*, 647 F.2d 300, 313–15 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (applying a separate constitutional due process analysis in the case of a suit against a foreign state); see also David J. Bederman, *Dead Man’s Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT’L & COMP. L. 255, 273–76 (1995). However, some have argued that the Fifth Amendment’s due process protections should not benefit foreign states. Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT’L L. 369 (2001); Joseph W. Glannon & Jeffery Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675 (1999).

⁵³⁵ For a general discussion of the various rationales, see BROHMER, *supra* note 15, at 9; HELMUT DAMIAN, STAATENIMMUNITÄTUND GERICHTSZWANG 12 (1985); GIUTTARI, *supra* note 16, at 5–7; Sucharitkul, *supra* note 39, at 117–20.

⁵³⁶ While it is not terribly difficult to find a discussion of the competing rationales for the doctrine of foreign state immunity in the literature, an analysis of the significance of these rationales for the application of the doctrine is virtually absent.

no power over an equal.”⁵³⁷ Theodore Giuttari aptly explains the maxim’s historical origins in the classic period of international law:

In this period, the state was generally conceived of as a juristic entity having a distinctive personality and entitled to specific fundamental rights, such as the rights of absolute sovereignty, complete and exclusive territorial jurisdiction, absolute independence and legal equality within the family of nations. Consequently, it appeared as a logical deduction from such attributes to conclude that as all sovereign states were equal in law, no single state should be subjected to the jurisdiction of another state.⁵³⁸

Thus, according to the “fundamental right” rationale, *par in parem non habet imperium* is simply a specific application of the general principle of sovereign equality. Despite the fact that modern international law has largely discarded the classic notion of inherent state rights, the “fundamental right” rationale has exhibited surprising resiliency. The Italian Corte di cassazione has opined, for example, that state immunity is “based on the customary principle *par in parem non habet jurisdictionem*, that has received universal acceptance.”⁵³⁹ The Polish Supreme Court found that “the basis of the immunity of foreign States is the democratic principle of their equality, whatever their size and power, which results in excluding the jurisdiction of one State over another (*par in parem non habet iudicium*).”⁵⁴⁰ Scholars, too, have embraced this rationale. An early edition of Oppenheim’s *International Law*, for example, described the foundations of

⁵³⁷ BLACK’S LAW DICTIONARY 1673 (7th ed. 1999). Professor Badr has traced the origins of the maxim back to the fourteenth-century Italian jurist, Bartolus, who wrote “*Non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium.*” BADR, *supra* note 16, at 89 (quoting BARTOLUS, TRACTATUS REPRESSALIUM, Questio I/3, para. 10 (1354)).

⁵³⁸ GIUTTARI, *supra* note 16, at 5.

⁵³⁹ Special Representative of the Vatican v. Pieciukiewicz, Cass., jt. sess., 5 July 1982, n.4005, 1983 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 379, *translated in* 78 ILR 120, 121, 1985 ITAL. Y.B. INT’L L. 179.

⁵⁴⁰ S. v. Brit. Treasury, PAŃSTWO I PRAWO, NO. 4, 1949, at 119 (Pol. Sup. Ct. Dec. 14, 1948), *translated in* 24 ILR 223, 224–25

state immunity as a “consequence of State equality,” with reference to the maxim *par in parem non habet imperium*.⁵⁴¹

In recent history, Communist publicists have been among the strongest supporters of the “fundamental right” rationale, which they found an attractive response to the emergent theory of restrictive state immunity, a theory that affords no immunity for acts of a commercial or private nature.⁵⁴² The restrictive view was antithetical to the prevailing socialist philosophy, which held that politics and trade were inseparable aspects of the socialist state; in essence, a socialist state acted qua state in all its dealings.⁵⁴³ M. M. Boguslavskij, the Russian scholar, thus rejected the notion that a state could surrender its sovereignty, and with it its right of state immunity, simply by engaging in commercial or private activity.⁵⁴⁴ He, like many of the socialist scholars, adhered to the “fundamental right” view.⁵⁴⁵

⁵⁴¹ LASSA OPPENHEIM, *INTERNATIONAL LAW* 239–41 (6th ed. 1947). More recently, Professor Sucharitkul, in his Hague Academy lectures, taught that the rationale for state immunity “may be expressed in terms of Sovereignty, Independence, Equality and Dignity of States,” which collectively form “a firm international legal basis for sovereign immunity.” Sucharitkul, *supra* note 39, at 117; *see also* Sompong Sucharitkul, *Immunity of States*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 327, 327 (Mohammed Bedjaoui ed., 1991) (“As a consequence of sovereignty and equality of States, each State is presumed, in certain circumstances, to have consented to waive or to refrain from exercising its exclusive territorial jurisdiction in a legal proceeding in which another State is a party without its consent.”). Professor Riesenfeld, too, appears to have placed significant weight on the principle of state equality. Stefan A. Riesenfeld, *Sovereign Immunity in Perspective*, 19 *VAND. J. TRANSNAT’L L.* 1, 1 (1986) (citing DICKINSON, *supra* note 41); *see also* RESTATEMENT, *supra* note 28, ch. 5 Introductory Note, at 390–91; Harvard Research in International Law, *Competence of Courts in Regard to Foreign States*, 26 *AJIL Supp.* 455, 527 (1932) [hereinafter Harvard Research]; COUNCIL OF EUROPE, *EXPLANATORY REPORTS ON THE EUROPEAN CONVENTION ON STATE IMMUNITY AND THE ADDITIONAL PROTOCOL 5* (1985).

⁵⁴² *See* sources cited *supra* note 18.

⁵⁴³ For a general discussion of the development of the Soviet theory of international law, *see* Grigory I. Tunkin, *Soviet Theory of Sources of International Law*, in *VÖLKERRECHT UND RECHTSPHILOSOPHIE: INTERNATIONALE FESTSCHRIFT FÜR STEPHAN VEROSTA* 66, 66 (Peter Fischer, Heribert Franz Köck, & Albert Verdross eds., 1980); *see also* BRANIMIR M. JANKOVIĆ, *PUBLIC INTERNATIONAL LAW* 60–65 (1984).

⁵⁴⁴ M. M. BOGUSLAVSKIJ, *STAATLICHE IMMUNITÄT* 168 (1965).

⁵⁴⁵ The Soviet view modernized the classic justification for *par in parem non habet imperium*, relying not on the concept of international personality but, rather, on Article 2(1) of the United Nations Charter, which enshrines the principle of the sovereign equality of all United Nations members. *See, e.g.*, L. A. LUNC, *MEZHDUNARODNOE CHASTNOE PRAVO, OSOBNENNAIA CHAST* (Private International Law) 77–91 (1975); I. S. PERETERSKII & S. B. KRYLOV, *MEZHDUNARODNOE CHASTNOE PRAVO* (Private International Law) 197–206 (2d. ed. 1959).

Of particular interest to this study are the implications of the “fundamental right” view regarding the nature and operation of state immunity. Here, Professor Sucharitkul’s comments are illustrative. In resolving the clash of norms inherent in problems of state immunity, he concludes: “It has become an established rule that between two equals, one cannot exercise sovereign will or power over the other, ‘*Par in parem non habet imperium*.’”⁵⁴⁶ While Sucharitkul acknowledges that the principle of territorial jurisdiction is a basic principle of international law, he emphasizes a state’s right to sovereign equality. Thus, according to Sucharitkul, the principle of state jurisdiction must give way to the principle of sovereign equality to effectuate a state’s right of immunity.⁵⁴⁷ This view, if correct, presents substantial obstacles to human rights litigation, as plaintiffs must contend with and overcome a state right to immunity, perhaps even of a fundamental nature.⁵⁴⁸

According to another view, state immunity arises not out of a fundamental state right but, rather, as an exception to the principle of state jurisdiction. On this theory, state immunity is ascribed to “practical necessity or convenience and particularly the desire to promote good will and reciprocal courtesies among nations.”⁵⁴⁹ Clearly, this aim largely influenced Justice Marshall’s opinion in *The Schooner Exchange*, where he recognized that “intercourse” between nations and “an interchange of those good offices which humanity dictates and its wants require” foster “mutual benefit.”⁵⁵⁰ States obtain such benefits, according to

⁵⁴⁶ Sucharitkul, *supra* note 39, at 117.

⁵⁴⁷ Professor Sucharitkul’s preference for state equality over state jurisdiction as the source of state immunity is clear from his subsequent comments: “Reciprocity of treatment, comity of nations and courtoisie internationale are very closely allied notions, which may be said to have afforded a *subsidiary or additional basis* for the doctrine of sovereign immunity.” *Id.* at 119 (emphasis added).

⁵⁴⁸ See “Resolving the conflict of principles” *infra*, which demonstrates that the “fundamental right” rationale provides a less persuasive explanation for the creation of the doctrine of foreign state immunity.

⁵⁴⁹ GIUTTARI, *supra* note 16, at 6.

⁵⁵⁰ *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 136 (1812). In *The Parlement Belge*, the court referred to state immunity as a “consequence of the absolute independence of every sovereign authority and of the *international comity* which induces every sovereign state to respect the independence of every other sovereign state.” [1880] 5 P.D. 197, 217 (emphasis added).

Justice Marshall, by means of their exclusive territorial jurisdiction.⁵⁵¹ In particular, he noted that “all sovereigns have consented to a relaxation in practice... of that absolute and complete jurisdiction within their respective territories which sovereignty confers.”⁵⁵² Justice Marshall went on to observe that the forum state could advance international affairs by granting a foreign sovereign “license” to conduct its affairs in the forum state.⁵⁵³ Such license was often conferred as part of a bilateral arrangement by which the foreign sovereign would afford reciprocal treatment to the representatives of the forum state when present in the foreign sovereign’s territory. The effect of this “relaxation” of jurisdictional authority, as Justice Marshall described it, was to permit a foreign sovereign, together with his representatives and property, to enter and operate within the forum state without fear of arrest, detention, or adverse legal proceedings.⁵⁵⁴

⁵⁵¹ Indeed, the first statement of law in Justice Marshall’s opinion affirms the exclusivity of the state’s territorial jurisdiction. *See* text at note 34 *supra*.

⁵⁵² 11 U.S. at 136. Justice Marshall observed that this “relaxation” of state jurisdiction had become established in three cases: (1) the exemption of the sovereign’s person from arrest or detention, (2) the immunity of foreign ministers, and (3) the free passage of friendly foreign troops. *Id.* at 137–40.

⁵⁵³ *Id.* at 137. Thus, according to Justice Marshall, a state is said “to waive the exercise of a part of that complete exclusive territorial jurisdiction.” *Id.* By way of clarification, the “waiver” of jurisdiction, described by Justice Marshall as creating the doctrine of state immunity, and the implied “waiver” of state immunity, which some argue occurs when a state violates *jus cogens*, are potentially confusing, yet distinct concepts. Here, in describing Justice Marshall’s theoretical construct, the term “license” is used. *See* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 321 (3d ed. 1979) (“By licence the agents of one state may enter the territory of another and there act in their official capacity.” (footnote omitted)) [hereinafter BROWNLIE (3d)]; Lauterpacht, *supra* note 28, at 229 (the language of *The Schooner Exchange* clearly indicates that “the governing, the basic, principle is not the immunity of the foreign state but the full jurisdiction of the territorial state and that any immunity of the foreign state must be traced to a waiver—express or implied—of its jurisdiction on the part of the territorial state”).

⁵⁵⁴ An exemption to the forum state’s jurisdictional authority was not necessary with respect to aliens. As Justice Marshall explained:

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

The Schooner Exchange, 11 U.S. at 144.

Support for Justice Marshall's "practical courtesy" approach is evident in international law scholarship. In his 1980 lectures at the Hague Academy, Ian Sinclair, commenting on *The Schooner Exchange*, described the "true foundation" of foreign state immunity as its "operation by way of exception to the dominating principle of territorial jurisdiction."⁵⁵⁵ He continued:

[O]ne does not start from an assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified. One starts from the assumption of no immunity, qualified by reference to the functional need (operating by way of express or implied license) to protect the sovereign rights of foreign States operating or present in the territory.⁵⁵⁶

Sir Robert Jennings echoed this sentiment when positing that in regard to state immunity, "territorial jurisdiction is the dominating principle."⁵⁵⁷

Unlike the "fundamental right" rationale, the "practical courtesy" view resolves the theoretical clash between sovereign equality and state jurisdiction in favor of the latter.⁵⁵⁸ As a consequence, the scope of the entitlement to state immunity is

⁵⁵⁵ Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 RECUEIL DES COURS 113, 215 (1980 II).

⁵⁵⁶ *Id.*

⁵⁵⁷ ROBERT JENNINGS, THE PLACE OF THE JURISDICTIONAL IMMUNITY OF STATES IN INTERNATIONAL AND MUNICIPAL LAW 19 (Vortrag vor dem Europa-Institut der Universität des Saarlandes No. 108, 1987); see also Higgins, *supra* note 19, at 271.

⁵⁵⁸ Professor Hyde explains:

Because the exercise of exclusive jurisdiction throughout the national domain is essential to the maintenance of the supremacy of the territorial sovereign, the most solid grounds of international necessity must be shown in order to justify a demand that a State consent to an exemption It becomes important, therefore, to examine the reasons urged in behalf of exemptions habitually demanded... [and] also to observe the nature and purpose of particular exemptions.

1 CHARLES CHENEY HYDE, INTERNATIONAL LAW 815-16 (2d rev. ed. 1945); see also General Principle of Exemption,

2 Hackworth, DIGEST §169, at 393 (ascribing the origins of state immunity to the consent of the territorial sovereign and the principle of equality, but also taking note of the "necessity of yielding the local jurisdiction... as an indispensable factor in the conduct of friendly intercourse between members of the family of nations"); 2 D. P. O'CONNELL, INTERNATIONAL LAW 915 (1965) ("Originally the waiver may have been *ex gratia*, but probably the universal practice of granting immunity has produced a rule of positive law.").

defined by the extent to which the forum state chooses to suspend its right of jurisdiction. As Justice Marshall insightfully pronounced: “All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.”⁵⁵⁹ Accordingly, on this theory, no norm of international law, not even the principle of sovereign equality, is capable of derogating a state’s jurisdictional authority as exercised legitimately by its own courts, except in cases where the forum state has agreed to waive this right.⁵⁶⁰

Resolving the conflict of principles: The primacy of adjudicatory jurisdiction.

Determining which of the above rationales more persuasively explains the theoretical foundation of state immunity has profound implications for human rights litigation.⁵⁶¹ If state immunity is deemed a fundamental right of statehood, then human rights litigants face nearly insurmountable obstacles. The state defendant is entitled to presumptive immunity and even the normative hierarchy theory cannot be effective because it is by no means clear that *jus cogens* norms trump a fundamental state right to immunity. Such negative consequences, however, need not be explored in detail here, as a critical examination of the two rationales reveals that the “practical courtesy” rationale is more persuasive than the “fundamental right” rationale. From this conclusion one may infer that the regulation of state immunity falls, as a threshold matter, within the authoritative domain not of the foreign state defendant but, rather, of the forum state. As described below, three reasons support this conclusion.

⁵⁵⁹ *The Schooner Exchange*, 11 U.S. at 136.

⁵⁶⁰ As explained in part II, the practice of waiving adjudicatory jurisdiction in favor of state immunity has crystallized into a rule of customary international law with respect to a limited core body of state conduct that serves the collective interests of the community of nations.

⁵⁶¹ In the last fifteen years, there has been little, if any, serious treatment of the significance of the competing rationales for foreign state immunity. *See, e.g.*, Report of the International Law Commission on the Work of Its Fortythird Session, [1991] 2 Y.B. Int’l L. Comm’n 32, UN Doc. A/CN.4/SER.A/1991 (Part 2) (choosing not to address the issue). One reason may be that with the general acceptance of the theory of restrictive immunity among the Western states, the drive to ponder such abstractions waned considerably. The loss of intellectual steam might have been further augmented by the decline of the Soviet Union and its dogmatic promotion of the “fundamental right” rationale. However, at the inception of another broad movement to restrict state immunity, now predicated on human rights protection, it is useful to revisit the topic and to attempt to determine which rationale should control.

The problem with the “fundamental right” rationale is that it assumes that the principle of sovereign equality is the root of the maxim *par in parem non habet imperium*, and thus that the maxim prohibits one state’s exercise of jurisdiction over another. The true meaning of sovereign equality, however, disproves this assumption.⁵⁶² Sovereign equality does not mean that all states are equal in any given circumstances but that, as Edwin Dickinson observed, every state enjoys an “equality of *capacity* for rights.”⁵⁶³ Dickinson based his views on those of Heffter, who wrote that sovereign equality “means nothing more nor less than that each state may exercise equally with others all rights that are based upon its existence as a state in the international society.”⁵⁶⁴ Thus, a state’s “capacity for rights,” according to Dickinson, relates to the freedom and ability of states to engage in official conduct typically associated with statehood, such as the formulation and promotion of domestic and foreign policies, the execution of treaties, and membership in international organizations.

This meaning of sovereign equality is further defined by the basic strictures of the system of international law. It is axiomatic that international law allocates sovereign authority to govern in accordance with national borders;⁵⁶⁵ the United States governs within U.S. territory on behalf of Americans, France governs within French territory on behalf of the French, and so on. Each state exercises territorial jurisdiction within its political unit as a function of its sovereignty. Thus, a state’s capacity for rights, like statehood itself, is linked to a defined geographical area, i.e., the territory within the national borders of the state.⁵⁶⁶ It

⁵⁶² Interestingly, Professor Brierly was quite skeptical about the principle of sovereign equality in general. J. L. BRIERLY, *THE LAW OF NATIONS* 130–32 (Humphrey Waldock ed., 6th ed. 1963).

⁵⁶³ DICKINSON, *supra* note 41, at 5 (emphasis added). “The meaning of equality as a legal principle is explained by a few modern writers in a way that approaches scientific precision. Some define it in terms that suggest equality of rights, and then proceed to explain it as equality of legal capacity.” *Id.* at 106.

⁵⁶⁴ *Id.* (quoting AUGUST WILHELM HEFFTER, *VOLKERRECHT* §§26–27).

⁵⁶⁵ *Western Sahara, Advisory Opinion*, 1975 ICJ REP. 12, 63–65 (Oct. 16); OPPENHEIM, *supra* note 6, at 121; SHAW, *supra* note 40, at 331.

⁵⁶⁶ In the *Lotus* case, the Permanent Court of International Justice found that “the first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State.” *Lotus case*, *supra* note 47, at 18. Indeed, territory is one of the fundamental conditions for statehood.

follows that this capacity for rights, albeit equal in potential to that of every other state, may have greater or lesser force, in relation to that of other states, in proportion to its connection to national territory. For example, a state's capacity for rights stands at its apogee when applied in relation to its own territory and citizens.⁵⁶⁷ Accordingly, "[a] sovereign state is one that is free to independently govern its own population in its own territory and set its own foreign policy"-to the exclusion of all other states.⁵⁶⁸

Conversely, by simple operation of the principle of sovereign equality, a state's capacity for rights will diminish when in direct conflict with another state's sphere of authority, i.e., the jurisdiction of that state over persons, property, and events in its national territory.⁵⁶⁹ For example, a foreign sovereign present in an alien forum state quite obviously may not govern on behalf of the local citizenry; again, this is a right that the forum state generally enjoys to the exclusion of all other states.⁵⁷⁰ Hence, the same principle of sovereign equality that entitles the foreign sovereign to govern with respect to its own national territory now excludes it from exercising authority in another state's territory. In such cases, the foreign state's capacity for rights with respect to the forum state reaches its lowest ebb.⁵⁷¹

Seen in this light, the literal meaning of *par in parem non habet imperium*, "an equal has no authority over an equal," fails to reflect the realities of the international legal order. The principle of sovereign equality means that every state enjoys an "equal capacity for rights" in relation to every other state, but it does not alter the fact that a state may exercise the rights of statehood only with respect to its own territory and population. If, according to international law, a

⁵⁶⁷ *Id.* at 18. Sovereignty is thus in the main a mutually exclusive concept; as with the laws of physics governing matter, no two sovereigns can occupy the same space at the same time.

⁵⁶⁸ JANIS, *supra* note 6, at 186; *see also* Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

⁵⁶⁹ As Professor Janis explains, the elements of statehood "impart a certain mutual exclusivity among states that we know as sovereignty, one of international law's most important principles." JANIS, *supra* note 6, at 185-86.

⁵⁷⁰ Lotus case, *supra* note 47, at 18.

⁵⁷¹ "Restrictions upon the independence of States cannot therefore be presumed." *Id.*

state is the sole master of its domain, persons and property located within the forum state necessarily come within the forum state government's control and authority—even if endowed with foreign sovereign status.⁵⁷² Were international law to dictate otherwise, the present state-centric paradigm would crumble.

This is not to say that foreign states should be refused immunity privileges in all circumstances but that an entitlement to immunity is not intrinsic to statehood.⁵⁷³ Thus, foreign state immunity is a privilege, not a right, and, accordingly, the maxim *par in parem non habet imperium* is a distortion of the principle of sovereign equality. Neither the maxim nor its purported progenitor, the principle of sovereign equality, persuasively supports the conclusion that one state *cannot* exercise jurisdiction over another, and the “fundamental right” rationale is fatally flawed for assuming so.⁵⁷⁴

The view that state immunity is a fundamental state right has often been used to support the absolute approach to immunity, which held that states enjoy complete immunity from foreign domestic proceedings.⁵⁷⁵ Indeed, absolutists

⁵⁷² Lauterpacht supports this conclusion on historical grounds. According to him, the relationship between the principle of sovereign equality and state immunity “finds no support in classical international law. Grotius does not refer to it. Bynkershoek occasionally deprecates it: ‘Principes dum contrahunt haberi privatorum loco.’ Vattel, after admitting it with regard to the person of the foreign sovereign, is silent with regard to the position of foreign states as such.” Lauterpacht, *supra* note 27, at 228 (citation omitted).

⁵⁷³ According to Professor Janis, the “rights” of statehood are not so broad as to include the right to be free from foreign domestic proceedings. JANIS, *supra* note 6, at 188.

⁵⁷⁴ In the ninth edition of Oppenheim's *International Law*, Jennings and Watts agree, but for a different reason:

It is often said that a third consequence of state equality is that—according to the rule *par in parem non habet imperium*—no state can claim jurisdiction over another. The jurisdictional immunity of foreign states has often also been variously—and often simultaneously—deduced not only from the principle of equality but also from the principles of independence and of dignity of states. It is doubtful whether any of these considerations supplies a satisfactory basis for the doctrine of immunity. There is no obvious impairment of the rights of equality, or independence, or dignity of a state if it is subjected to ordinary judicial processes within the territory of a foreign state—in particular if that state, as appears to be the tendency in countries under the rule of law, submits to the jurisdiction of its own courts in respect of claims brought against it. The grant of immunity from suit amounts in effect to a denial of a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection.

OPPENHEIM, *supra* note 6, at 341–42 (footnotes omitted).

⁵⁷⁵ This point formed the linchpin of the Communist position on foreign state immunity. See text at notes 55–58 *supra*.

would argue that, as a product of the principle of sovereign equality, immunity extends to the limits of a state's sovereignty and, moreover, that a state acts *qua* state in all of its affairs regardless of the nature of its conduct. Absolute immunity is a myth, however—a fact that undermines the “fundamental right” approach on which absolute immunity is understood to rest. A brief assessment of the historical growth of the doctrine of state immunity proves this point.

First, it is a myth that states ever enjoyed absolute immunity from foreign jurisdiction.⁵⁷⁶ While scholars often refer to an early period of “absolute immunity,” typically citing *The Schooner Exchange* as the leading case of the day, this title has more historical than legal significance and should not be interpreted as meaning that states were exempt at that time from foreign jurisdiction in all circumstances.⁵⁷⁷ Indeed, after a rigorous examination of *The Schooner Exchange*, Gamal Badr persuasively argued:

For [Chief Justice] Marshall... the starting point [of the case] was the local state's exclusive territorial jurisdiction to which immunity was an exception emanating from the will of the local state itself. He did not envisage a blanket immunity for the foreign state as a general rule, to which exceptions would be made to permit the exercise of the local state's territorial jurisdiction.⁵⁷⁸

⁵⁷⁶ As Michael Byers explains:

[A]n examination of the history of state immunity, which is primarily a history of national court judgments and national legislation, suggests that absolute immunity was not an established rule. Rather, history suggests that there was no rule regulating state immunity from jurisdiction prior to restrictive immunity becoming a rule of customary international law, and that a mistaken belief in such a preexisting rule served to retard that later development.

Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 170 (1995); see also BROHMER, *supra* note 15, at 14-15.

⁵⁷⁷ The organizational bifurcation of international law textbooks into sections on “absolute immunity” and “restrictive immunity” tends to add to the confusion. See, e.g., BUERGENTHAL & MURPHY, *supra* note 39, at 234–36; CARTER, TRIMBLE, & BRADLEY, *supra* note 17, at 547–52; LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1200–42 (4th ed. 2001).

⁵⁷⁸ BADR, *supra* note 16, at 11.

Indeed, this crucial observation led Professor Badr to conclude that *The Schooner Exchange* “does not uphold the proposition that there exists a peremptory rule of international law requiring that an absolute immunity from the territorial jurisdiction be recognized in favour of foreign states.”⁵⁷⁹

The more realistic explanation of the absolute approach is that at one time foreign states, as a practical matter, were immune from foreign jurisdiction.⁵⁸⁰ In the eighteenth and nineteenth centuries, sovereigns interacted with one another in peacetime in a very limited way, predominantly through diplomatic intercourse or military cooperation.⁵⁸¹ Consequently, interstate disputes almost inevitably touched upon sensitive foreign policy matters. The law of state immunity reflected these sensitivities and the prevailing preference for resolving these disputes by diplomacy, rather than adjudication. Most likely, claims against states in respect of private conduct-though technically not barred from foreign adjudication-were also handled diplomatically in accordance with the prevailing state-centric paradigm.⁵⁸² Thus, one cannot equate the fact that courts did not exercise jurisdiction over foreign states in this early period with a general prohibition against doing so on account of the principle of sovereign equality.

Second, the emergence and increasing acceptance of a restrictive approach to immunity is itself antithetical to the “fundamental right” approach.⁵⁸³ The classic justification for the distinction between public and private acts in the restrictive immunity theory was that the sovereign, in effect, descends from his throne when

⁵⁷⁹ *Id.* at 13.

⁵⁸⁰ According to the American Law Institute, “Until the twentieth century, sovereign immunity from the jurisdiction of foreign courts *seemed* to have no exceptions.” RESTATEMENT, *supra* note 28, ch. 5 Introductory Note, at 391 (emphasis added).

⁵⁸¹ SHAW, *supra* note 40, at 494 (noting that the “relatively uncomplicated role of the sovereign and of government in the eighteenth and nineteenth centuries logically gave rise to the concept of absolute immunity”).

⁵⁸² Such claims would most likely have been handled on the state level according to the law of diplomatic protection. *See generally* EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1927).

⁵⁸³ For a description of this position, see text at notes 50–61 *supra*.

operating as a merchant and thereby subjects himself to the local laws of the forum state.⁵⁸⁴ Though this distinction in state activity is admittedly somewhat arbitrary, it nevertheless undermines the “fundamental right” position. If state immunity were really based on a fundamental principle of international law, then the movement toward restricting immunity would not have encountered so few legal and political obstacles. In other words, if state immunity were a fundamental state right, it would never be susceptible to theoretical division along public/private lines.

The “practical courtesy” rationale furnishes the more persuasive and realistic explanation for the doctrine of state immunity because it appropriately emphasizes the vital role of the principle of adjudicatory jurisdiction.⁵⁸⁵ As a logical matter, a foreign state cannot be entitled to immunity without the prior existence of a jurisdictional anchor to establish the court’s competence.⁵⁸⁶ This observation results from the plain fact that a court lacking jurisdictional competence is completely devoid of authority to adjudicate a legal dispute.⁵⁸⁷ Thus, as the International Court of Justice explained in the *Case Concerning the Arrest Warrant of 11 April 2000*, “[I]t is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction.”⁵⁸⁸ Addressing the role of jurisdiction is thus crucial to any understanding of the true nature and operation of the doctrine of state immunity. *The Schooner Exchange* highlights this point, because there Justice Marshall realized, quite rightly, that jurisdiction must be established before state immunity could be considered. Jurisdiction was not contested in that case because the presence of the *Exchange* in U.S.

⁵⁸⁴ See *The Schooner Exchange*, 11 U.S. at 145; BADR, *supra* note 16, at 11.

⁵⁸⁵ The “fundamental right” view provides no meaningful treatment of this topic.

⁵⁸⁶ See BADR, *supra* note 16, at 80–84; BROHMER, *supra* note 15, at 37–41; James Crawford, *A New Foreign State Immunities Act for Australia?* 1983 AUSTL. Y.B. INT’L L. 71, 92; Christian Dominice, *The Relationship Between State Immunity and the Jurisdiction of Courts*, in *International Law Association, Documentation for the Members of the Committee on State Immunity* (prepared for the ILA Cairo Conference, 1992).

⁵⁸⁷ In general, there must be a reasonable link between the dispute and the forum state. See BROWNIE (5th), *supra* note 6, at 301.

⁵⁸⁸ *Arrest Warrant*, *supra* note 23, para. 46; see also *id.*, Joint Separate Opinion of Judges Higgins, Kooijmans, & Buergenthal, para. 5, 41 ILM at 574.

territorial waters constituted the necessary connection with the forum to establish the district court's *in rem* jurisdiction.⁵⁸⁹ With this matter established—one that the “fundamental right” view neglects—state immunity could only obtain as an exception to the adjudicatory jurisdiction of the forum state.

Nevertheless, the principle of sovereign equality cannot be said to have no function in the state immunity equation. On the contrary, respect for the coequal status of a foreign sovereign state serves typically as the primary motivation for granting immunity privileges.⁵⁹⁰ On this theory, however, a state's entitlement to immunity is not compelled by the principle of sovereign equality but, rather, derives from the forum state's waiver of adjudicatory jurisdiction with the aim of promoting mutually beneficial interstate relations.⁵⁹¹

Finally, the “practical courtesy” rationale promotes a more sensible international policy than the “fundamental right” rationale. States understood to possess a fundamental right to immunity would be permitted to act with impunity. Carried to the logical extreme, this notion would mean that foreign states acting in their foreign capacity could never be held accountable by the forum state. On the other hand, if state immunity is considered a practical courtesy, capable of being modified (or even withdrawn, if need be), then a more balanced relationship is maintained between the foreign state and the forum state. A foreign state will be more cautious about treading on the interests of other states, fearing that unacceptable conduct will result in the withdrawal of immunity and, in turn, the review of such conduct by domestic courts.

Correcting false presumptions. The foregoing discussion has revolved primarily around the broad principles animating the doctrine of foreign state immunity, and

⁵⁸⁹ See JENNINGS, *supra* note 72, at 22 (“For competence, both juridically and physically in respect of persons and property within the territory of the forum is the normal basis of curial power and ultimately therefore of curial authority.”).

⁵⁹⁰ Even states that have adopted the theory of restrictive immunity still cite these factors as a reason. RESTATEMENT, *supra* note 28, ch. 5 Introductory Note, at 390.

⁵⁹¹ See *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

has shown, in particular, the theoretical persuasiveness of the “practical courtesy” rationale. Indeed, this persuasiveness is significant because it suggests that a forum state remains unrestricted, at least by a fundamental principle of international law, from exercising jurisdiction over a foreign-state human rights offender, so long as an appropriate connection exists between the alleged offense and the forum state.⁵⁹²

Yet when one surveys the actual law of foreign state immunity, as formulated and applied, an entirely different picture emerges. In practice, the *rules* that regulate state immunity law assume that a foreign state *is* immune from suit, unless demonstrated otherwise. Taking an example from national practice, section 1604 of the U.S. Foreign Sovereign Immunities Act of 1976 (FSIA) contains the general rule that “a foreign state shall be immune from the jurisdiction of the courts of the United States,” which may be abrogated only by application of one of the exceptions to immunity enumerated in section 1605.⁵⁹³ According to the FSIA’s legislative history, the statute “starts from a premise of immunity and then creates exceptions to the general principle.”⁵⁹⁴ Similarly, the Swiss Federal Tribunal wrote:

According to a generally recognized rule of public international law, the sovereignty of each State is limited by the immunity of other States, in particular with regard to the jurisdiction of municipal courts and proceedings for enforcement. One State cannot be brought before the courts of another State except in exceptional circumstances.⁵⁹⁵

⁵⁹² The applicable bases of jurisdiction under international law are outlined *supra* note 47.

⁵⁹³ 28 U.S.C. §§1604–1605 (2000).

⁵⁹⁴ H.R. REP. NO. 94-1487, at 17 [hereinafter HOUSE REPORT]. The drafters did not intend that the plaintiff should bear the burden of proving that a state was not immune, but the construction of the rule has had this effect in practice. *Cf. McDonnell Douglas Corp. v. Iran*, 758 F.2d 341, 348 (8th Cir. 1985) (noting that the “FSIA recognizes that sovereign immunity is the exception, rather than the rule . . .”).

⁵⁹⁵ *Libyan Arab Socialist People’s Jamahiriya v. Actimon SA*, translated in 82 ILR 30, 32 (Switz. Fed. Trib. Apr. 24, 1985).

These approaches, a function of codification in the American case and of constitutional orientation in the Swiss (as described further in the next section), unnecessarily build theoretical hurdles to human rights litigation.⁵⁹⁶

International instruments paint largely the same picture. Article 15 of the European Convention provides: “A Contracting State shall be entitled to immunity from the jurisdiction of courts of another Contracting State if the proceedings do not fall within Articles 1 to 14,” which enumerate various exceptions to immunity.⁵⁹⁷ Article 5 of the draft articles on jurisdictional immunities of states and their property of the International Law Commission (ILC) provides that “[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles.”⁵⁹⁸ Articles 10 through 17 subsequently carve out various exceptions to the general rule. In the case of the draft articles, the Drafting Committee’s rapporteur, Professor Sucharitkul, stated the following about the draft articles’ theoretical approach:

[T]he draft articles should begin to attempt the formulation of a basic rule of State immunity. Based upon a series of the available source materials on State practice..., the draft has to face two interesting sets of options. In the first place, a rule of international law on State immunity could start from the very beginning as a rule of State immunity, or it could go back beyond and before the beginning of State immunity. It could... regard immunity not as a rule, nor less as a general rule of law, but more appropriately.... as an exception to a more basic rule of territorial sovereignty.... [T]he International Law Commission is more inclined

⁵⁹⁶ Some scholars have approached the doctrine of foreign state immunity similarly. *See, e.g.*, BENEDETTO CONFORTI, *DIRITTO INTERNAZIONALE* 220 (5th ed. 1997) (explaining that state immunity is the rule rather than the exception).

⁵⁹⁷ European Convention, *supra* note 26, Art. 15.

⁵⁹⁸ For the most recent version of the draft articles, see Report of the *Ad Hoc* Committee on Jurisdictional Immunities and Their Property, UN GAOR, 57th Sess., Supp. No. 22, annex, at 3–13, UN Doc. A/57/22 (2002), available at <http://www.un.org/law/jurisdictionalimmunities/index.html>. For the 1991 draft articles with commentary, see THE INTERNATIONAL LAW COMMISSION (1949–1998), at 2006–103 (Arthur Watts ed., 1999).

towards cutting the Gordian knot at the beginning, and beginning with a general rule of State immunity....⁵⁹⁹

Several practical reasons can help to explain why state immunity is treated as the general rule, but unfortunately they have resulted in a misleading legal framework.⁶⁰⁰ Indeed, viewing state immunity as the general rule obfuscates the reality that state immunity derives from a forum state's concession of jurisdiction and is not presumptively a right under international law, as explained above.⁶⁰¹ Reversing these false presumptions about foreign state immunity is no small task. As Rosalyn Higgins has counseled, "It is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction."⁶⁰² However, by understanding that "[i]t is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity,"⁶⁰³ the possibilities for meaningful and effective human rights litigation emerge. With jurisdiction as the rule and immunity as the exception, it is incumbent upon the foreign state defendant, not the individual plaintiff, to point to the rule, domestic or international, that requires immunity.

⁵⁹⁹ Sompong Sucharitkul, *Developments and Prospects of the Doctrine of State Immunity: Some Aspects of Codification and Progressive Development*, 29 NETH. INT'L L. REV. 252, 261 (1982).

⁶⁰⁰ Other codification projects have established a similar legal framework based on a blanket rule of immunity. See International Law Association, Revised Draft Articles for a Convention on State Immunity, Art. II (66th Conf., 1994); Harvard Research, *supra* note 54, Art. 7. The work of the Institut de Droit International is the notable exception, enumerating criteria indicative of the competence and incompetence of the forum state in actions against foreign states. See Contemporary Problems Concerning the Jurisdictional Immunity of States, [1991] 2 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 214.

⁶⁰¹ As Professor Schreuer points out, both approaches may result in confusion.

If immunity is the starting point, a requirement of a positive universal practice for any restriction is bound to lead to an assertion of absolute immunity. On the other hand, if we proceed from a general rule of jurisdiction, we will find it difficult, if not impossible, to find proof of a uniform practice supporting immunity.

CHRISTOPH H. SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 5 (1988). Still, weighing the options, the latter course of logic is more beneficial to the development of the doctrine of foreign state immunity because it adds more flexibility to its scope and nature.

⁶⁰² Higgins, *supra* note 19, at 271.

⁶⁰³ *Id.*

8.2 *The Status of State Immunity in Relation to International Law*

If, as argued above, the doctrine of foreign state immunity does not derive from a fundamental principle of international law, namely sovereign equality, then what is the status of the doctrine in relation to international law? As previously noted, there is only one comprehensive multilateral agreement that governs state immunity, the European Convention on State Immunity, which has been ratified by only a handful of countries.⁶⁰⁴ Thus, for the vast majority of states, state immunity is unregulated by treaty as a general matter.⁶⁰⁵ The next question, then, involves determining the extent to which foreign state immunity is binding on states as customary international law. The following discussion demonstrates that, although customary international law compels immunity protections as to a limited core body of state conduct, a broader range of state behavior not included in the core, such as state-sponsored human rights violations, is entitled to immunity solely as a matter of domestic law.⁶⁰⁶

The scope of state immunity under customary international law. What is the scope of immunity protection afforded foreign states under customary international law? From Justice Marshall's perspective in *The Schooner Exchange*, determining the extent of immune conduct under international law was a rather straightforward exercise. Viewing a state's entitlement to immunity as the exception, not the rule, he deduced readily from state practice those "peculiar circumstances" in which states had waived jurisdiction in favor of immunity. The prevailing international custom led Justice Marshall to conclude that states had waived jurisdiction in favor of the following categories of

⁶⁰⁴ The European Convention has been adopted by eight countries: Austria, Belgium, Cyprus, Germany, Great Britain, Luxembourg, the Netherlands, and Switzerland. The Additional Protocol to the Convention, May 16, 1972, Europ. TS No. 74A, has been ratified by six countries. For a discussion of other treaties of peripheral relation, see BRÖHMER, *supra* note 15, at 121–25.

⁶⁰⁵ Indeed, the Convention for the Settlement of Investment Disputes Between States and Nationals of Other States expressly provides that none of its provisions dealing with the recognition and enforcement of an ICSID arbitral award "shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." Convention for the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, Art. 55, 17 UST 1270, 575 UNTS 159.

⁶⁰⁶ An exhaustive inductive study of the consistency and uniformity of state practice and the existence of *opinion juris* in this area is unfortunately not possible in an article of this length.

immunity: (1) the freedom of the foreign sovereign from arrest or detention, (2) the diplomatic protection of foreign ministers, (3) the free passage of friendly foreign troops, and (4) the passage of friendly warships present in the host state.⁶⁰⁷ Immunity for conduct falling into one of these categories was warranted because of the “mutual benefit” that such protection provides to the community of nations.⁶⁰⁸ Any state conduct that fell outside the core of immune activity did not require immunity protection.⁶⁰⁹

Twentieth-century developments, however, have obscured Justice Marshall's direct observations. As the globalization of trade and commerce increasingly brought states and private merchants into contact, many states sought to expand their entitlement to immunity beyond the strictures of customary international law so as to evade any commercial liability in a transaction gone sour.⁶¹⁰ This self-serving policy laid the foundation for the myth that states were immune from suits of all kinds.⁶¹¹ In time, principles of fairness in commercial dealing prevailed and compelled the movement to restrict immunity as to a state's commercial or private conduct, *acta jure gestionis*. The primary justification for the restrictive theory of immunity was said to be that judicial review of foreign state conduct of a commercial or private nature did not affront the dignity of the state.

Approaching the question of immunity on the basis of the *imperii* / *gestionis* distinction produced a metaphysical quandary: where should the line between

⁶⁰⁷ *The Schooner Exchange*, 11 U.S. at 137–41.

⁶⁰⁸ *Id.* at 136.

⁶⁰⁹ As obiter dictum, Marshall stated:

[I]t may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern.

Id. at 145.

⁶¹⁰ As explained, a state's right to absolute immunity is based on a myth. *See* text at notes 88–95 *supra*.

⁶¹¹ *See* text at notes 88–95 *supra*.

public and private state conduct be drawn?⁶¹² For example, is a contract between a foreign state entity and a private manufacturer for the purchase of army boots a public or private act? To simplify matters, the restrictive approach came to focus more on establishing undisputed categories of no immune conduct and neglected to develop firm criteria for determining immune conduct.⁶¹³ The codification movement on both the national and international levels proceeded on a similar basis. National state immunity legislation, the European Convention, and the leading codification projects enumerated detailed categories of nonimmune conduct, i.e., the “exceptions” to immunity, while leaving all other state conduct to fall under a catchall rule of immunity. As explained above, this approach inappropriately reversed the presumption of immunity in the doctrine of foreign state immunity.⁶¹⁴

As a result of its awkward development, the restrictive approach to immunity, as adopted by most states, draws the line between immune and nonimmune conduct at a point beyond that required by customary international law. In fact, most states afford a range of immunity protections to foreign states that exceed the demands of customary international law. Accordingly, the doctrine of foreign state immunity is currently stratified into three types of state conduct: (1) conduct that is immune by virtue of customary international law, (2) conduct that is immune solely by virtue of domestic law, and (3) conduct that is not entitled to immunity under either customary international law or domestic law.

The ICJ’s recent decision in *Arrest Warrant of April 11, 2000* provides strong evidence as to the existence and nature of the rule of state immunity under customary international law. In that case, the Democratic Republic of the Congo protested the issuance by a Belgian investigating magistrate of “an international arrest warrant *in absentia*” against the incumbent minister for foreign affairs of the Congo, alleging violations of human rights and humanitarian law. The ICJ found that “in international law it is firmly established that, as also diplomatic and

⁶¹² William W. Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AJIL 93, 105 (1953).

⁶¹³ BROHMER, *supra* note 15, at 22 (“The question why a state should enjoy immunity for governmental acts was largely avoided.”).

⁶¹⁴ See text at notes 105–16 *supra*.

consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”⁶¹⁵ Notably, the ICJ’s conclusion squares precisely with Justice Marshall’s findings in *The Schooner Exchange* regarding the immunities of foreign ministers and thus reaffirms the status of customary international law in that area.

What is perhaps most interesting about the *Arrest Warrant* case is its rationale for an international rule of state immunity. The ICJ concluded that customary international law compels state immunity regarding foreign ministers “to ensure the effective performance of their functions on behalf of their respective States” and to “protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.”⁶¹⁶ The *Arrest Warrant* decision is again entirely consistent with the findings in *The Schooner Exchange*, in which Justice Marshall concluded that states waive their right to adjudicatory jurisdiction over a foreign state as to certain conduct that promotes the “mutual benefit” of the community of nations, such as the exchange of foreign ministers.⁶¹⁷ From these cases, a persuasive rationale for granting immunity with respect to certain state conduct emerges—a rationale that arguably is a prerequisite to establishing the *opinio juris* necessary for a rule of customary international law.⁶¹⁸

⁶¹⁵ *Arrest Warrant*, *supra* note 23, para. 51; *see also id.*, para. 54 (concluding, on the basis of customary international law, that “the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability”).

⁶¹⁶ *Id.*, paras. 53, 54.

⁶¹⁷ *The Schooner Exchange*, 11 U.S. at 136.

⁶¹⁸ Courts and commentators typically ascertain customary international law on the basis of two traditional elements, the general practice of states and *opinio juris*. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), *erits*, 1986 ICJ REP. 14 (June 27); Continental Shelf (Libya/Malta), 1985 ICJ REP. 13, 29 (June 3). According to the ninth edition of Oppenheim, “A *custom* is a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right.” OPPENHEIM, *supra* note 6, at 27. Professor Hudson explains: “The elements necessary are the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time.” MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920–1942, at 609 (1943); *see also* Luigi Condorelli, *Custom*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, *supra* note 54, at 179, 187.

Conversely, when state conduct fails to promote “mutual benefit” among nations, the international law status of a rule that immunizes such conduct is dubious at best. Two examples from U.S. case law underscore this point. In *Letelier v. Republic of Chile* and *Liu v. Republic of China*, U.S. courts found that assassinations by foreign government agents committed in the United States were not “discretionary” state conduct within the meaning of the FSIA and thus fit into the FSIA’s exception to immunity for torts committed in U.S. territory.⁶¹⁹ Under a strict application of the *imperii / gestionis* distinction, such conduct, i.e., state-sanctioned assassination, would be immune by virtue of its official mandate.⁶²⁰ However, in *Letelier* and *Liu* the courts did not identify a rule of international law that required immunity where the state conduct in question was “clearly contrary to the precepts of humanity as recognized in both national and international law.”⁶²¹

The 1996 amendment to the FSIA⁶²² further evidences that customary international law does not immunize detrimental state conduct. The 1996 amendment creates an additional category of nonimmune conduct as to a limited range of acts committed by states designated by the U.S. government as “state sponsors of terrorism.”⁶²³ The amendment applies to actions by or on behalf of U.S. citizens that allege “personal injury or death that was caused by an act of

The first element, state practice, represents the objective element of the test: a rule of international law exists only if reflected in the general practice of states. KEHURST, *supra* note 6, at 39. The latter element, *opinio juris*, represents the test’s subjective element: in addition to conforming to state practice, a state must feel compelled to do so by an international law obligation. *Id.* at 44 (describing *opinio juris* as the “psychological element” of the test).

⁶¹⁹ *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.D.C. 1980); *Liu v. Republic of China*, 642 F.Supp. 297, 305 (N.D. Cal. 1986).

⁶²⁰ See SCHREUER, *supra* note 114, at 47.

⁶²¹ *Letelier*, 488 F.Supp. at 673; *Liu*, 642 F.Supp. at 305 (quoting *Letelier*). *Prefecture of Voiotia*, discussed in detail in text at notes 279–86 *infra*, reaches the same conclusion.

⁶²² 28 U.S.C. §1605(a)(7) (2000). The amendment was promulgated as §221 of the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, §221, 110 Stat. 1214, 1241 (1996).

⁶²³ 28 U.S.C. §1605(a)(7). At the time of this writing, Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria were so designated. U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM: 2002, at 76 (2003), available at <<http://www.state.gov/s/ct>>.

torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources” for such acts.⁶²⁴ The provision flatly rejects the traditional *imperii / gestionis* distinction in its application to conduct that “is engaged in by an official, employee, or agent of such foreign state *while acting within the scope of his or her office, employment, or agency*.”⁶²⁵ Notably, although the U.S. government expressed opposition to the 1996 amendment in a previous form, it never asserted that curtailing immunity for state conduct that violates human rights would constitute a breach of international law.⁶²⁶

To summarize: It is established that customary international law mandates immunity as to a core body of state conduct. However, because of the awkward development of the theory of restrictive immunity, insufficient attention has been paid to defining the exact content of this core as it has developed since Justice Marshall’s assessment in 1812. In fact, the prevailing approach to state immunity obscures the reach of the international rule of state immunity by establishing a false presumption of immunity and creating a catchall category for immune conduct. As a consequence, the current formulation of the doctrine of foreign state immunity, as adopted by most states, the European Convention, and the leading codification projects,⁶²⁷ grants foreign states more immunity privileges than customary international law dictates.

Emerging consensus regarding restrictive immunity. For much of the last century, state immunity practice has been starkly divided between two groups of nations: countries that have favored the theory of restrictive immunity, mainly the Western capitalist countries; and countries that have clung to the theory of absolute immunity, mainly the Communist and socialist countries. Recent developments indicate that the gap between absolutist and restrictivist states is narrowing. The collapse of the Soviet empire has brought about great social and political

⁶²⁴ 28 U.S.C. §1605(a)(7).

⁶²⁵ *Id.* (emphasis added).

⁶²⁶ *The Foreign Sovereign Immunities Act: Hearing on S.825 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong. 8, 10 (1994) (testimony of Stuart Schiffer, deputy assistant attorney general, Civil Division, U.S. Dep’t of Justice, and Jamison S. Borek, deputy legal adviser, U.S. Dep’t of State).

⁶²⁷ *But see supra* note 113 (describing the work of the Institut de Droit International).

changes in Eastern Europe, which have slowly influenced state immunity practice in the formerly Communist countries. The development of market economies and the participation in global commerce by the former Soviet countries, especially Russia, have strained the utility of the doctrine of absolute immunity and undoubtedly will cause a policy shift toward restrictive immunity.⁶²⁸ Evidence suggests that even the People's Republic of China, a staunch supporter of absolute immunity, may be moderating its position.⁶²⁹ Such tendencies, while not yet etched in stone, show that the gap between absolutist and restrictivist practice may be as narrow today as it has ever been.⁶³⁰

Still, setting aside the narrowing of the absolute/restrictive immunity split, one finds a myriad of substantive variations in national approaches to state immunity law. While each and every variation cannot possibly be addressed here, one significant example is revealing. The FSIA, for instance, instructs U.S. courts to look at the "nature" and not the "purpose" of a foreign state defendant's conduct in order to determine whether such conduct is commercial or public in nature

⁶²⁸ Daniel J. Michalchuk, *Filling a Legal Vacuum: The Form and Content of Russia's Future State Immunity Law: Suggestions for Legislative Reform*, 32 LAW & POL'Y INT'L BUS. 487, 497 (2001) ("With Russia's emergence as a market economy, the theoretical and ideological foundations for an absolute approach to state immunity no longer exist in the Russian Federation."). New constitutional regimes in the former Soviet republics will also permit a greater role for international law in domestic systems by including constitutional provisions similar to those of the civil law systems of Western Europe. See Gennady M. Danilenko, *Implementation of International Law in CIS States: Theory and Practice*, 10 EUR. J. INT'L L. 51 (1999); Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AJIL 451 (1994); Oleg Tiunov, *The Constitution Court of the Russian Federation and International Law*, in LIBER AMICORUM BENGT BROMS 627 (Matti Tupamäki ed., 1999). See generally CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE (Rein Müllerson, Malgosia Fitzmaurice, & Mads Andenæs eds., 1998).

⁶²⁹ Compare Zhengyu Ni, *supra* note 68, and Jill A. Sgro, Comment, *China's Stance on Sovereign Immunity: A Critical Perspective on Jackson v. People's Republic of China*, 22 COLUM. J. TRANSNAT'L L. 101 (1983), with Guiguo Wang, *China's Attitude Towards State Immunity—An Eastern Approach*, in JAPAN AND INTERNATIONAL LAW: PAST, PRESENT AND FUTURE 153, 171–72 (Nisuke Ando ed., 1999) (speculating that the People's Republic of China would abide by the International Law Commission's draft articles on state immunity since its chairman, Shi Jiuyong, is a representative of the PRC government).

⁶³⁰ Opinion is still in great flux. See Hazel Fox, *A "Commercial Transaction" Under the State Immunity Act 1978*, 43 INT'L & COMP. L.Q. 193, 193 (1994) ("[U]nlike the Soviet Union, members of the CIS and Central European States have indicated support for a restrictive rule, although the People's Republic of China and some Latin American States remain in favour of absolute immunity.").

and, thus, whether it is immune or nonimmune from suit.⁶³¹ French courts, by contrast, appear to place more emphasis on the purpose of the operative state act, instead of its nature. The Cour de cassation, France's highest court, held that foreign states may be entitled to immunity not only for *acta jure imperii*, but also for acts performed in the interest of public service.⁶³² Thus, the real possibility exists that U.S. and French courts may draw the line between immune and nonimmune foreign state conduct in very different places.⁶³³

Accordingly, James Crawford's earlier observation that the distinction between immune and nonimmune state conduct is drawn less by international law and more by national laws is equally relevant today.⁶³⁴ Hazel Fox similarly posits that while there is a clear trend "away from an absolute doctrine to a restrictive doctrine... the absence of a universal convention and the diversity of State practice... produce[] extraordinary complexity and variety in the emerging rules."⁶³⁵ Such significant variations in national practice have led another state immunity scholar, Joseph Dellapenna, to conclude his comparative study of immunity practice in the United Kingdom, France, and Germany with the following words:

All these countries, in grappling with the need to constrain the actions of sovereigns by the rule of law, have developed roughly similar responses that are collectively described by the rubric of the "restrictive theory of foreign state immunity." *A closer examination of the details of the several*

⁶³¹ 28 U.S.C. §1603(d) (2000). For a summary of the long struggle to distinguish public from private acts, see JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 148–52 (1988).

⁶³² Cass. 1e civ., May 2, 1990, Bull. civ. I, No. 9. For a discussion of the implications of this case, see BRÖHMER, *supra* note 15, at 110; Klaus Gabrinski, *Staatenimmunität im Erkenntnisverfahren—die französische Rechtsprechung im internationalen, insbesondere deutschen Vergleich*, 12 IPRA 55 (1992).

⁶³³ Recognizing the varying practices of states in this regard, the International Law Commission proposed draft Article 3(2), *see supra* note 111, which incorporates both aspects into the test for a commercial transaction. D.W. Greig, *Forum State Jurisdiction and Sovereign Immunity Under the International Law Commission's Draft Articles*, 38 INT'L & COMP. L.Q. 243, 256–57 (1989).

⁶³⁴ Crawford, *supra* note 19, at 77–78.

⁶³⁵ FOX, *supra* note 15, at 127; *see also* Fox, *supra* note 143, at 194.

*approaches to foreign state immunity... demonstrates, however, that consensus exists only at a rather high level of abstraction.*⁶³⁶

Because the doctrine of foreign state immunity is a mix of international law and domestic law, the reach of restrictive immunity, i.e., the extent to which states are not immune, may or may not be an international law question. Indeed, the nature of the inquiry depends on whether the core of immune conduct is implicated. In the *Arrest Warrant* case, for example, the ICJ addressed the scope of a sitting foreign minister's immunities, a category of state conduct that clearly touches upon established customary international law matters. In contrast, in the *Letelier* and *Liu* cases, U.S. courts examined state conduct, namely assassination, that clearly falls outside the core body of immune conduct. Thus, the issue of immunity was decided solely as a matter of domestic law, and customary international law played no role in the analysis.

The conceptual divide between the civil law and common law countries. The mixed character of the doctrine of foreign state immunity has produced varying emphasis on its component parts in the civil law and common law systems, respectively. A review of the literature from the civil law and common law countries reveals starkly divergent views on the roles that international law and domestic law play in formulating state immunity policy. On the one side, the civil law countries deem state immunity generally to be a principle of customary international law that must be applied domestically by national courts. On the other side, the common law countries place more emphasis on regulating state immunity through domestic legislation, not customary international law.⁶³⁷

Even a brief look at the civil law literature shows that these countries are firmly committed to the notion that state immunity originates in customary international

⁶³⁶ Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51, 61 (1992) (emphasis added).

⁶³⁷ There are a few exceptions. Argentina, a civil law country, recently enacted national state immunity legislation. Law No. 24488 (Inmunidad jurisdiccional de los Estados extranjeros ante los Tribunales argentinos), June 22, 1995, BOLETÍN OFICIAL, June 28, 1995, at 1. In Ireland, a common law country, the Supreme Court, in *McElhinney v. Secretary of State*, felt compelled to draw on customary international law since Ireland had not enacted national immunity legislation. [1996] 1 I.L.R.M. 276.

law. Regarding state immunity, Antonio Cassese writes that “limitations are imposed upon State sovereignty by customary rules.”⁶³⁸ Jurgen Bröhmer also writes: “The law of state immunity as it now stands as a customary rule of international law is commonly based and justified on various general principles of international law.”⁶³⁹ Professors Cassese and Brohmer, like other civil law scholars, appear to accept state immunity’s status as international custom as a given.⁶⁴⁰

The rationale for the civil law position largely derives from two factors: (1) the civil law constitutional design; and (2) the lack of national immunity legislation in many civil law countries.⁶⁴¹ The Italian experience is illustrative. The Italian Constitution, like many civil law constitutions, includes a broad and binding mandate regarding national compliance with international law. Article 10 of the Italian Constitution states: “The Italian legal system shall conform with the generally recognized rules of international law.”⁶⁴² This provision not only endows Italian judges with the power to ensure national compliance with international law, but also imposes a constitutional obligation to do so. Thus, Italian courts, like most civil law courts, are generally inclined to view themselves as the chief interpreters and enforcers of international law.⁶⁴³

⁶³⁸ ANTONIO CASSESE, *INTERNATIONAL LAW* 91 (2001).

⁶³⁹ BROHMER, *supra* note 15, at 9.

⁶⁴⁰ See *id.*; DAMIAN, *supra* note 48, at 10; see also CASSESE, *supra* note 151, at 91; CONFORTI, *supra* note 109, at 226–27; RESS, *supra* note 24, at 177; Anna Wyrozumska, *The State Immunity in the Practice of Polish Courts*, 1999–2000 POLISH Y.B. INT’L L. 77, 92, 94. But see JENÖ C. A. STAEHELIN, *DIE GEWOHNHEITSRECHTLICHE REGELUNG DER GERICHTSBARKEIT UBER FREMDE STAATEN IM VOLKERRECHT* 99–128 (1969) (arguing that foreign state immunity is regulated by the municipal law of the forum state only).

⁶⁴¹ See, however, the Argentine law, *supra* note 150.

⁶⁴² COST. Art. 10, first sentence (“L’ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute”). For similar provisions, see Article 25 of the German Constitution, Article 20(1) of the Danish Constitution, Article 93 of the Spanish Constitution, Article 28 of the Greek Constitution, and Article 8(1) of the Portuguese Constitution. For a general discussion, see Vladlen S. Vereshchetin, *New Constitutions and the Old Problem of the Relationship Between International Law and National Law*, 7 EUR. J. INT’L L. 29 (1996).

⁶⁴³ This point has been made effectively by one of Italy’s eminent scholars, Professor Conforti:

[T]he truly legal function of international law essentially is found in the internal legal systems of States. Only through what we could term “domestic legal operators” can we describe the binding character of international law or, better still, its ability to be implemented in a concrete and stable fashion.... [C]ompliance with international law relies not so much on enforcement mechanisms available at the

Combined with the lack of immunity legislation in many civil law countries, this constitutional obligation has given rise to the belief that state immunity law derives from customary international law.⁶⁴⁴ According to one civil law scholar, there can be no other possible origin.⁶⁴⁵ Indeed, the Italian Corte di cassazione in the *Pieciukiewicz* case declared that the doctrine of state immunity is rooted in a “customary principle” that “comes under the purview of Article 10(1)” of the Italian Constitution.⁶⁴⁶

In contrast, the common law countries tend to perceive state immunity as more a product of domestic law, although originally this was not the case. In *The Schooner Exchange*, as seen, Justice Marshall looked to international custom to determine the scope of entitlement to foreign state immunity.⁶⁴⁷ However, since that early time, the common law approach has changed dramatically owing in large part to an influential article published in 1951 by Hersch Lauterpacht entitled *The Problem of Jurisdictional Immunities of Foreign States*.⁶⁴⁸ In that

international level, but rather on the resolve of domestic legal operators such as public servants and judges to use to their limits the mechanisms provided by municipal law to ensure compliance with international norms. In other words, the sprawling body of international rules, pervasive in all sectors of the political, economic and social life of each State and between States, but lacking in judicial and coercive enforcement procedures at the international level, can be implemented only insofar as the basic values shared by all people irrespective of nationalities are reflected by the domestic operators of all countries.

BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS 8-9 (1993).

⁶⁴⁴ The presence or absence of national immunity legislation is also significant. See the example of *McElhinney v. Secretary of State*, *supra* note 150.

⁶⁴⁵ In the context of the immunities of international organizations, one scholar has written: “The absence of a specific statute on the immunity of international organizations compels Italian courts to decide such issues on the basis of international law.” Andrea Bianchi, Book Review, 88 AJIL 212, 212 (1994) (reviewing SAVERIO DE BELLIS, *L’IMMUNITA DELLE ORGANIZZAZIONI INTERNAZIONALI DALLA GIURISDIZIONE* (1992)).

⁶⁴⁶ *Pieciukiewicz*, *supra* note 52, 78 ILR at 121. Similarly, the Greek Supreme Court stated: “We ascertain the general practice of the nations of the international community, which is accepted as custom, that is, [we ascertain] the formation of international custom, which is, according to article 28, paragraph 1 of the Constitution, an integral part of the [Greek] domestic legal order, superseding any statutory provision to the contrary.” Greek Judgment II, *supra* note 15, at 7. Scholars have echoed this proposition. See sources cited *supra* note 153.

⁶⁴⁷ In noting states’ consent to a relaxation of absolute jurisdiction, see text at note 65 *supra*, Justice Marshall added that “[t]his consent may, in some instances, be tested by *common usage*, and by *common opinion*, growing out of that usage.” 11 U.S. at 136 (emphasis added).

publication, the English scholar made the then-provocative declaration that there was “no rule of international law which obliges states to grant jurisdictional immunity to other states.”⁶⁴⁹ In support, Professor Lauterpacht relied on two points of evidence. First, he noted that during the twentieth century when the prevailing rule of absolute immunity began to lose its force, “international practice show[ed] no frequent instances of protests against assumption of jurisdiction, including execution, over foreign states.”⁶⁵⁰ Second, Lauterpacht cited the fact that many states granted immunity privileges on the basis of reciprocity and added that “[s]tates do not make the observance of established rules of international law dependent upon reciprocity.”⁶⁵¹ Free from the constraints of international law, Lauterpacht went on to establish the “assimilative approach” to state immunity, according to which a state is immune from suit only to the extent that the host state enjoys immunity before its own courts.⁶⁵²

Upon assessing the development of state immunity law more than twenty-five years later, Professor Brownlie, in the third edition of his treatise, observed: “it is difficult as yet to see a new principle which would satisfy the criteria of uniformity and consistency required for the formation of a rule of customary international law.”⁶⁵³ Brownlie suggested a “fresh approach” to state immunity:

The concepts of sovereign immunity..., the exclusive jurisdiction of the state within its own territory, and the need for an express license for a foreign state to operate within that national jurisdiction..., can be taken as starting points. Each state has an existing power, subject to treaty obligations, to exclude foreign public agencies, including even diplomatic representation. If a state chooses, it

⁶⁴⁸ Lauterpacht, *supra* note 27. According to one leading commentator on state immunity, Lauterpacht’s essay “had a strong stimulative effect in the United States.” Address by Monroe Leigh, *in* INTERNATIONAL LAW ASSOCIATION, STATE IMMUNITY: LAW AND PRACTICE IN THE UNITED STATES AND EUROPE 3, 3 (Proceedings of a conference held on Nov. 17, 1978).

⁶⁴⁹ Lauterpacht, *supra* note 27, at 228.

⁶⁵⁰ *Id.* at 227.

⁶⁵¹ *Id.* at 228.

⁶⁵² *Id.* at 236–41.

⁶⁵³ See BROWNLIE (3d), *supra* note 66, at 333; *see also* Higgins, *supra* note 19, at 271.

would enact a law governing immunities of foreign states which would enumerate those acts which would involve acceptance of the local jurisdiction.⁶⁵⁴

After citing as examples of such acts the conclusion of contracts subject to private law and consent to arbitration, Brownlie proposed that foreign trade partners of the host state be notified about the new legislation, which would take effect after sufficient time to allow them to withdraw, and that rights under such agreements could be reserved. He continued:

States would thus be given a license to operate within the jurisdiction with express conditions and the basis of sovereign immunity, as explained in the *Schooner Exchange*, would be observed. Such a legal regime would be subject to the inevitable immunity *ratione materiae*..., and the principles of international law as to jurisdiction. The approach suggested would avoid the difficulties of the distinction between acts *jure gestionis* and acts *jure imperii*.⁶⁵⁵

Thus, Brownlie, like Lauterpacht, suggested that the doctrine of immunity was not a rule of customary international law.

Lauterpacht and other commentators who agreed with him influenced the contemporary common law view of state immunity.⁶⁵⁶ Indeed, Monroe Leigh, the

⁶⁵⁴ BROWNLIE (3d), *supra* note 66, at 334 (internal references omitted).

⁶⁵⁵ *Id.* (footnotes and internal reference omitted). Professor Brownlie reaffirmed his doubts as to the existence of a customary rule of foreign state immunity more recently. *Id.* (5th), *supra* note 6, at 332–33.

⁶⁵⁶ Another scholar well versed in the common law concluded a significant study on state immunity practice by stating: “[I]t has become difficult to say whether State immunity is a question of customary international law, of treaty law or of domestic law.” SCHREUER, *supra* note 114, at 4. Some common law scholars, however, have disagreed with Lauterpacht and Brownlie. The American Law Institute, for example, maintains that “[t]he immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law.” RESTATEMENT, *supra* note 28, ch. 5 Introductory Note, at 390. Professor Jennings has posited:

[I]t is difficult to see how immunity can be denied the status of a rule of international law when certain constituents of the same general principle—e.g. the immunity enjoyed by visiting heads of State, or foreign warships in port, as well as on the seas—have all the marks of firm and general public international law. Diplomatic immunities,—of those who represent the sovereign, and

FSIA's chief architect, stated that in the years leading up to the U.S. change in policy from the absolute to the restrictive approach to immunity, "there was no agreement among the students of international law as to whether Sovereign Immunity was a principle of customary international law or merely a matter of comity between nations."⁶⁵⁷ Consequently, when reforming U.S. state immunity policy in the 1970s, the drafters of the FSIA undoubtedly felt free to operate on the basis that, save for a limited area of immunity law governed primarily by treaty, "the entire field is open to definition by domestic law."⁶⁵⁸ That several common law countries followed the U.S. lead and enacted their own domestic immunity legislation reflects broad consensus on this matter.⁶⁵⁹

The distinct perspectives of the civil law and common law countries regarding the source of state immunity law have yielded divergent approaches to solving the human rights litigation problem. The civil law countries, with their emphasis on international law, are arguably more inclined to address human rights issues on the international law level and thus more receptive to approaches like the normative hierarchy theory.⁶⁶⁰ The common law countries, with their skepticism about state immunity's broad reach under international law, generally prefer to regulate state immunities through the application of domestic legislation.⁶⁶¹ While the merits of each approach are debatable, the civil law perspective has created,

which immunities can be waived by him-have recently been confirmed as rules of international law by the International Court of Justice.

JENNINGS, *supra* note 70, at 4–5; *see also* FOX, *supra* note 15, at 68-70.

⁶⁵⁷ Leigh, *supra* note 161, at 4.

⁶⁵⁸ Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 302 (1986).

⁶⁵⁹ Professor Badr compiled a collection of many of these statutes. BADR, *supra* note 16, appendices, at 169. *But see* Andrea Bianchi, *Denying State Immunity to Violators of Human Rights*, 46 AUS. J. PUB. & INT'L L. 195, 197 (1994) ("The fact that the rulings of domestic courts have shaped the developments of state immunity and that, recently, some states have passed legislation on the subject, does not infringe upon the international nature of the rule.").

⁶⁶⁰ *Prefecture of Voiotia v. Federal Republic of Germany*, the only case to adopt the normative hierarchy theory, originated in a civil law country, Greece.

⁶⁶¹ Accordingly, the statement by the Swiss Federal Tribunal that a "state cannot be brought before the courts of another state except in exceptional circumstances" is inaccurate. *See* text at note 108 *supra*.

as explained below, a propensity for adopting the normative hierarchy theory and thus unnecessarily complicates resolution of the human rights litigation problem.

8.4 The Relationship between Human Rights and State Immunity

In light of the discussion in part I, one must measure the normative hierarchy theory against two fundamental legal realities: (1) state immunity arises not out of a fundamental right of statehood but, rather, out of the concession of a forum state's right of adjudicatory jurisdiction; and (2) foreign states are not entitled to immunity under customary international law as to most, if not all, activity that constitutes human rights offenses.⁶⁶² The common thread running through both observations (and the crucial point that the normative hierarchy theory overlooks) is that the forum state, not the foreign state defendant, holds the authority to regulate the scope and content of the state immunity privilege. Part II presents a summary of the normative hierarchy theory, as developed in the American and European contexts, and then turns to a substantive critique of the theory.

The Anatomy of the Normative Hierarchy Theory

The American approach. The normative hierarchy argument had its genesis in the United States. The notion that foreign sovereign immunity might be trumped by superior international law norms first emerged as a reaction to the U.S. Supreme Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*⁶⁶³ In that case, the plaintiffs sued in tort to reclaim losses arising out of the unprovoked bombing of an oil tanker on the high seas by the government of Argentina, allegedly a violation of international law.⁶⁶⁴ The Court ruled that the FSIA was "the sole basis for obtaining jurisdiction over a foreign state" in U.S.

⁶⁶² Such claims would also have to fall within the forum state's right to exercise adjudicatory jurisdiction with respect to them.

⁶⁶³ 488 U.S. 428 (1989).

⁶⁶⁴ *Id.* at 431.

courts.⁶⁶⁵ Moreover, the Court held that American courts may hear suits against foreign states only where Congress has explicitly provided a statutory exception to the FSIA's general rule of immunity.⁶⁶⁶ A suit involving an armed attack against a ship on the high seas was not one over which Congress had intended the courts to exercise jurisdiction, the Court found, and thus it rejected the plaintiffs' claim.⁶⁶⁷

The Court's restrictive interpretation of the FSIA's exceptions to immunity prompted a group of three law students to publish an inventive Comment in 1991 entitled *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*.⁶⁶⁸ The authors propose that states lose all entitlement to state immunity under international law when they injure individuals in violation of *jus cogens* norms. Their theory starts from the premise that, following the Nuremberg trials, the structure of international law changed; in particular, the "rise of *jus cogens*" placed substantial limitations on state conduct in the name of peaceful international relations.⁶⁶⁹ Indeed, "[b]ecause *jus cogens* norms are hierarchically superior to the positivist or voluntary laws of consent, they absolutely restrict the freedom of the state in the exercise of its sovereign powers."⁶⁷⁰

⁶⁶⁵ *Id.* at 434. Accordingly, the Court rejected each of the plaintiffs' proposed bases of jurisdiction: the U.S. Alien Tort Statute, 28 U.S.C. §1350, general admiralty and maritime jurisdiction, 28 U.S.C. §1333, and the principle of universal jurisdiction under customary international law.

⁶⁶⁶ *Id.* at 434–35. The Court noted that Congress had clearly addressed international law violations in 28 U.S.C. §1605(a)(3), which denies foreign states immunity in cases "in which rights in property taken in violation of international law are in issue." *Id.* at 435–36.

⁶⁶⁷ The plaintiffs argued to no avail that the facts of the case triggered the FSIA's noncommercial torts exception, §1605(a)(5), and that the Argentine government's ratification of certain treaties regulating state conduct on the high seas triggered §1604, the "international agreements" exception. *Id.* at 439–43. Some have argued that, while not a formal exception to immunity under the FSIA, the international agreements exception is a mechanism for denying a state immunity for violations of international law. *See, e.g.,* Von Dardel v. Union of Soviet Socialist Republics, 623 F.Supp. 246, 255–56 (D.D.C. 1985); Jordan J. Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA*, 8 HOUS. J. INT'L L. 49, 61–65 (1985).

⁶⁶⁸ Adam C. Belsky, Mark Merva, & Naomi Roht-Arriaza, Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989).

⁶⁶⁹ *Id.* at 381, 385–89.

⁶⁷⁰ *Id.* at 386.

This conclusion has ramifications for the doctrine of state immunity, the authors argue. Their theory turns on the assumption that state immunity is a product of state sovereignty, resting “on the foundation that sovereign states are equal and independent and thus cannot be bound by foreign law without their consent.”⁶⁷¹ Since state immunity is not a peremptory norm, when invoked in defense of a violation of *jus cogens*, it must yield to “the ‘general will’ of the international community of states.”⁶⁷² Accordingly,

[b]ecause *jus cogens*, by definition, is a set of rules from which states may not derogate, a state act in violation of such a rule will not be recognized as a sovereign act by the community of states, and the violating state therefore may not claim the right of sovereign immunity for its actions.⁶⁷³

In causing harm to an individual in violation of *jus cogens*, a state may no longer raise an immunity defense because the state may be regarded as having implicitly waived any entitlement to immunity.⁶⁷⁴ To give domestic effect to this waiver in U.S. courts, the authors point to section 1605(a)(1) of the FSIA, which empowers the exercise of district court jurisdiction in cases in which a state “has waived its immunity either explicitly or *by implication*.”⁶⁷⁵

While the implied waiver argument has never formed the basis of a legal decision in U.S. courts, it has not lacked influence on U.S. judges.⁶⁷⁶ In *Siderman de Blake v. Republic of Argentina*,⁶⁷⁷ the U.S. Court of Appeals for the Ninth Circuit accepted the argument’s basic premise. The case involved the alleged torture of

⁶⁷¹ *Id.* at 390.

⁶⁷² *Id.*

⁶⁷³ *Id.* at 377.

⁶⁷⁴ *Id.* at 394.

⁶⁷⁵ 28 U.S.C. §1605(a)(1) (emphasis added).

⁶⁷⁶ The closest that a U.S. court has come was in *Von Dardel v. Union of Soviet Socialist Republics*, in which the Court concluded, on the basis of the FSIA’s “international agreements” exception, that the Soviet Union could not claim immunity for certain acts that constituted breaches of treaties to which the Soviet Union was a party. 623 F.Supp. 246, 256 (D.D.C. 1985).

⁶⁷⁷ 965 F.2d 699 (9th Cir. 1992) (citing Belsky et al., *supra* note 181).

an Argentine citizen and expropriation of property by Argentine military officials.⁶⁷⁸ Following the logic of the implied waiver theory, the plaintiffs argued that *jus cogens* trumps foreign state immunity, resulting in the defendant's loss of immunity for torturing the victim, José Siderman.⁶⁷⁹ The court determined that Argentina was not immune from suit because Argentina had waived its entitlement to immunity under section 1605(a)(1) of the FSIA by involving itself in U.S. legal proceedings,⁶⁸⁰ but in dicta it echoed the plaintiff's arguments, stating that "[a] state's violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law."⁶⁸¹

The normative hierarchy argument again received substantial consideration in *Princz v. Federal Republic of Germany*,⁶⁸² a case involving claims of personal injury and forced labor arising from the plaintiff's imprisonment in Nazi concentration camps. In *Princz*, the U.S. Court of Appeals for the District of Columbia denied the plaintiff's claims, specifically rejecting the normative hierarchy argument.⁶⁸³ Judge Patricia Wald, however, advocated its application in an impassioned dissent. "Germany waived its sovereign immunity by violating the *jus cogens* norms of international law condemning enslavement and genocide," she wrote.⁶⁸⁴ To support this conclusion, Judge Wald contended: "*Jus cogens* norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity."⁶⁸⁵ Judge Wald considered the waiver of immunity to be a fact of

⁶⁷⁸ *Id.* at 702–04.

⁶⁷⁹ *Id.* at 714–19.

⁶⁸⁰ *Id.* at 719–23.

⁶⁸¹ *Id.* at 718.

⁶⁸² 26 F.3d 1166 (D.C. Cir. 1994).

⁶⁸³ The majority's decision against the plaintiff turned on the determination that the "*jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in §1605(a)(1)," the waiver exception. *Id.* at 1174.

⁶⁸⁴ *Id.* at 1179 (Wald, J., dissenting).

⁶⁸⁵ *Id.* at 1182.

international law and thus urged that the FSIA's waiver provision be construed consistently, so as to allow plaintiffs to sue states for violations of *jus cogens*.⁶⁸⁶

Though never formally accepted as the basis for judicial decision in U.S. courts, the normative hierarchy theory continues to spark interest among jurists and scholars alike. Plaintiffs suing under the FSIA for alleged human rights violations continually press for its application.⁶⁸⁷ Numerous scholars and international law commentators have also become engaged in the debate over the validity of the normative hierarchy theory.⁶⁸⁸ However, the current position of U.S. courts to interpret the FSIA's implied waiver provision strictly is likely to incapacitate the normative hierarchy theory from amending U.S. state immunity policy.

*The contribution of continental Europe.*⁶⁸⁹ Though it originated in the United States, the normative hierarchy theory has had a substantial impact in the

⁶⁸⁶ *Id.* at 1183–84.

⁶⁸⁷ In *Smith v. Socialist People's Libyan Arab Jamahiriya*, the court intimated acceptance of the normative hierarchy theory, stating:

[W]e conclude that Congress's concept of an implied waiver, as used in the FSIA, cannot be extended so far as to include a state's existence in the community of nations—a status that arguably should carry with it an expectation of amenability to suit in a foreign court for violations of fundamental norms of international law.

101 F.3d 239, 244 (2d Cir. 1996). Plaintiffs continue to raise the normative hierarchy theory in U.S. courts. *See, e.g.,* *Boshnjaku v. Federal Republic of Yugoslavia*, 2002 WL 1575067 (N.D. Ill. July 18, 2002); *Garb v. Republic of Poland*, 207 F.Supp.2d 16 (E.D.N.Y. 2002); *Abrams v. Societe Nationale des Chemins de Fer Francais*, 175 F.Supp.2d 423 (E.D.N.Y. 2001); *Joo v. Japan*, 172 F.Supp.2d 52 (D.D.C. 2001); *In re World War II Era Japanese Forced Labor Litigation*, 164 F.Supp.2d 1160 (N.D. Cal. 2001); *Hirsh v. State of Israel*, 962 F.Supp. 377 (S.D.N.Y. 1997).

⁶⁸⁸ The theory has received considerable support among American scholars. *See* Bederman, *supra* note 47, at 282; William Pepper, *Iraq's Crimes of State Against Individuals, and Sovereign Immunity*, 18 BROOK. J. INT'L L. 313 (1992); Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, 16 MICH. J. INT'L L. 403 (1995); *see also* KENNETH RANDALL, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM* (1990); Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191 (1983). A number of student-written notes have also supported the theory. *See, e.g.,* Joseph G. Bergen, Note, *Prinz v. The Federal Republic of Germany: Why the Courts Should Find That Violating Jus Cogens Norms Constitutes an Implied Waiver of Sovereign Immunity*, 14 CONN. J. INT'L L. 169 (1999); Thora A. Johnson, Note, *A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity Under the Federal Sovereign Immunities Act*, 19 MD. J. INT'L L. & TRADE 259 (1995); Scott A. Richman, Comment, *Siderman de Blake v. Republic of Argentina: Can the FSIA Grant Immunity for Violations of Jus Cogens Norms?* 19 BROOK. J. INT'L L. 967 (1993).

⁶⁸⁹ This heading is not meant to imply that no consideration of the relationship between human rights and foreign state immunity has occurred outside the United States and Europe. *See, e.g.,* Garnett, *supra* note 24,

countries of continental Europe.⁶⁹⁰ For instance, in his treatise on public international law, Professor Cassese writes that “peremptory norms [or *jus cogens*] may impact on *State immunity from the jurisdiction of foreign States*, in that they may remove such immunity.”⁶⁹¹ In support, he cites, among other sources, Judge Wald’s dissent in *Princz v. Federal Republic of Germany*.⁶⁹² Professor Bianchi states that “[r]eliance on the hierarchy of norms in the international legal system is a viable argument to assert non-immunity for major violations of international human rights.”⁶⁹³ The European brand of the theory is nearly identical in concept to its American predecessor: because *jus cogens*, a primary norm, is hierarchically superior to state immunity, a secondary norm, a foreign state is not immune for violations of human rights norms of a peremptory nature.

Where the European approach distinguishes itself is in its potential to affect national state immunity policy. Since the civil law countries of continental Europe have not enacted national immunity legislation and many of their constitutional

at 121 (stating that it is “unlikely that an Australian court would be prepared to recognise an implied exception to immunity for *jus cogens* violations in the Australian [State Immunity] Act”); Niranjini Vivekananthan, *The Doctrine of State Immunity & Human Rights Violations of Foreign States*, 8 SRI LANKA J. INT’L L. 125 (1996) (supporting the normative hierarchy theory).

⁶⁹⁰ The United Kingdom is excluded from this category merely because its experience with the normative hierarchy theory is similar to that of the United States. Indeed, in the area of foreign state immunity law, the United Kingdom and the United States have traveled along a similar path. See generally Clark C. Siewert, Note, *Reciprocal Influence of British and United States Law: Foreign Sovereign Immunity Law from The Schooner Exchange to the State Immunity Act of 1978*, 13 VAND. J. TRANSNAT’L L. 761 (1980). As with the U.S. approach to the theory, UK courts have restrictively interpreted the exceptions to immunity in the State Immunity Act so as to stymie its application to human rights cases. See *Al-Adsani v. Kuwait*, 103 ILR 420 (Q.B. 1995), *aff’d*, 107 ILR 536 (C.A. 1996). However, the normative hierarchy theory has found some support. *Id.* at 547 (Ward, J., concurring) (interpreting the Act narrowly but recognizing that the theory “is a powerful one”). The dissent in *Al-Adsani* before the European Court of Human Rights also supported the theory. ECHR Judgment, *supra* note 1, at 29 (Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto, & Vajie, JJ., dissenting).

⁶⁹¹ CASSESE, *supra* note 151, at 145.

⁶⁹² *Id.*

⁶⁹³ Bianchi, *supra* note 172, at 219. The European literature is replete with additional support for the normative hierarchy theory. See, e.g., Magdalini Karagiannakis, *State Immunity and Fundamental Human Rights*, 11 LEIDEN J. INT’L L. 9 (1998); Juliane Kokott, *Mißbrauch und Verwirkung von Souveränitätsrechten bei ravierenden Völkerrechtsverstößen*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: VÖLKERRECHT—EUROPARECHT—STAATSRECHT, FESTSCHRIFT FÜR RUDOLF BERNHARDT 135 (1995); Norman Paech, *Wehrmachtsverbrechen in Griechenland*, 32 KRITISCHE JUSTIZ 380 (1999).

systems oblige national courts to look to international law for guidance on foreign state immunity,⁶⁹⁴ it comes as no surprise that the civil law Europeans approach the normative hierarchy theory from the perspective of progressive jurisprudential development. Professor Bianchi, for example, calls for “a coherent interpretation” of the norms of the international legal order to resolve “the inconsistency between the rule of state immunity and the principle of protection of fundamental human rights.”⁶⁹⁵ According to Bianchi, ensuring that the application of international law produces just results requires judges to undertake a “value-oriented” interpretation of international law norms, giving preference to peremptory norms, such as the protection of human rights, over norms of lesser importance, such as state immunity.⁶⁹⁶

Largely free from the constraints of national immunity legislation and treaty obligations, a civil law court not surprisingly would feel inclined to make the type of “value-oriented” decision that Bianchi encourages. The adjudication of *Prefecture of Voiotia v. Federal Republic of Germany* in the Greek courts provides an apt example. The facts of the case arose out of the Nazi occupation of southern Greece during World War II. During that period Nazi military troops committed war atrocities against the local inhabitants of the Prefecture of Voiotia in 1944, particularly in the village of Distomo, including willful murder and destruction of personal property. Over fifty years later, the plaintiffs, mostly descendants of the victims, sued the Federal Republic of Germany in the Greek Court of First Instance of Leivadia for compensation for the material damage and mental suffering endured at the hands of the Nazis.⁶⁹⁷

On the preliminary matter of jurisdiction, the court of first instance invoked the normative hierarchy theory to rule that Germany was not immune from suit. The

⁶⁹⁴ See text at notes 151–59 *supra*.

⁶⁹⁵ Bianchi, *supra* note 172, at 220; see also Andrea Bianchi, *Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 405 (Benedetto Conforti & Francesco Francioni eds., 1997).

⁶⁹⁶ Bianchi, *supra* note 172, at 222.

⁶⁹⁷ *Prefecture of Voiotia v. Federal Republic of Germany*, No. 137/1997 (Ct. 1st Inst. Leivadia, Oct. 30, 1997), translated in Maria Gavouneli, *War Reparation Claims and State Immunity*, 50 REVUE HELLENIQUE DE DROIT INTERNATIONAL 595 (1997) [hereinafter Greek Judgment I]. For an English summary of the decision, see Ilias Bantekas, Case Report: *Prefecture of Voiotia v. Federal Republic of Germany*, 92 AJIL 765 (1998).

court found that, “according to the prevailing contemporary theory and practice of international law opinion,... the state cannot invoke immunity when the act attributed to it has been perpetrated in breach of a *jus cogens* rule.”⁶⁹⁸ The rule of *jus cogens* that the court identified was contained in Articles 43 and 46 of the regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague Regulations).⁶⁹⁹ Article 43 obligates an occupying power to respect the laws in force in the occupied territory and to ensure public order and safety, while Article 46 obliges occupying powers to protect certain rights of the occupied, especially the rights to family honor, life, private property, and religious convictions.⁷⁰⁰ The court concluded that the demonstrated breach of this rule deprives a state of an immunity defense in domestic proceedings.

The reasons that the court provided in support of its decision are revealing and worth reiterating in their entirety:

a) When a state is in breach of peremptory rules of international law, it cannot lawfully expect to be granted the right of immunity. Consequently, it is deemed to have tacitly waived such right (constructive waiver through the operation of international law); b) Acts of the state in breach of peremptory international law cannot qualify as sovereign acts of state. In such cases the defendant state is not considered as acting within its capacity as sovereign; c) Acts contrary to peremptory international law are null and void and cannot give rise to lawful rights, such as immunity (in application of the general principle of law *ex iniuria jus non oritur*); d) the recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order; e) The invocation of immunity for acts committed in breach of a peremptory norm of

⁶⁹⁸ Greek Judgment I, *supra* note 210, at 599.

⁶⁹⁹ *Id.*

⁷⁰⁰ Regulations Respecting the Laws and Customs of War on Land, Art. 43, annexed to Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

international law would constitute abuse of right; and finally f) Given that the principle of territorial sovereignty, as a fundamental rule of the international legal order, supersedes the principle of immunity, a state in breach of the former when in illegal occupation of foreign territory, cannot possibl[y] invoke the principle of immunity for acts committed during such illegal military occupation.⁷⁰¹

The reasoning in subsections a) through e) bears the traditional marks of the normative hierarchy theory. The court's pronouncement in subsection d) would appear to take the theory one step further, indicating that its nonapplication would implicate the forum state in the foreign state defendant's alleged breach of international law. Subsection f) is somewhat incongruous, seemingly advocating an entirely separate ground for denying immunity based on the forum state's authority to define its own state immunity law. Relying on this reasoning, the court awarded the plaintiffs 9.5 billion drachmas (approximately \$30 million) in the form of a default judgment.⁷⁰²

The Hellenic Supreme Court, Areios Pagos, affirmed the holding of the lower court and arguably supported its reasoning relating to the normative hierarchy theory.⁷⁰³ The Court began its analysis with the so-called torts exception to immunity. After reviewing the international law landscape,⁷⁰⁴ the Court concluded that an exception to immunity for torts committed by a foreign state in the forum state's territory was established in customary international law, "even if the acts were *acta jure imperii*."⁷⁰⁵ Second, the Court identified what it perceived as an obstacle to application of the torts exception in this case: the atrocities at issue

⁷⁰¹ Greek Judgment I, *supra* note 210, at 599–600.

⁷⁰² Ralph Atkins & Gerrit Wiesmann, *Greek Reparations Move Angers Berlin*, FIN. TIMES (London), July 12, 2000, World News—Europe, at 10.

⁷⁰³ Greek Judgment II, *supra* note 15. For an English summary and commentary on the case, see Maria Gavouneli & Ilias Bantekas, Case Report: Prefecture of Voiotia v. Federal Republic of Germany, 95 AJIL 198 (2001). For an analytical discussion of the case, see Bernhard Kempen, *Der Fall Distomo: Griechische Reparationsforderungen gegen die Bundesrepublik Deutschland*, in *TRADITION UND WELTOFFENHEIT DES RECHTS: FESTSCHRIFT FÜR HELMUT STEINBERGER 179* (Hans Joachim-Cremer et al. eds., 2002).

⁷⁰⁴ The Court cited the European Convention on State Immunity, *supra* note 26, the ILC's draft articles on state immunity, *supra* note 111, and the work of the Institut de Droit International, *supra* note 113, as well as U.S. case law.

⁷⁰⁵ Greek Judgment II, *supra* note 15, at 7.

were probably committed in the course of armed conflict, a situation in which the foreign state, even as occupier, would generally retain immunity.⁷⁰⁶ However, the Court found that this rule of immunity was inapplicable, because

in the case of military occupation that is directly derived from an armed conflict and that, according to the now customary rule of Article 43 of the [Hague Regulations], does not bring about a change in sovereignty or preclude the application of the laws of the occupied State, crimes carried out by organs of the occupying power in abuse of their sovereign power do not attract immunity.⁷⁰⁷

Accordingly, the Court determined that the Nazi atrocities were an “abuse of sovereign power,” on which Germany could not base an immunity defense.⁷⁰⁸

The Court’s decision to apply the torts exception to deny immunity for acts ostensibly of a public nature itself represents an interesting departure from the traditional public/private distinction in state immunity law. What is more attention grabbing about the decision, though, is that the Court, in reaching it, drew upon the normative hierarchy theory. Specifically, the Court found that the Nazi acts in question were “in breach of rules of peremptory international law (Article 46 of the [Hague Regulations]),” and thus that “they were not acts *jure imperii*.”⁷⁰⁹ Consequently, the Court concluded that Germany had impliedly waived its immunity.⁷¹⁰ As a result, one may view the Court’s decision as the first endorsement of the normative hierarchy theory by a significant national tribunal.

⁷⁰⁶ *Id.* The Court cited paragraph 4 of the commentary on Article 12 in the ILC’s draft articles on the jurisdictional immunities of states, *supra* note 111, which limits the scope of that provision to “intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination”; Article 31 of the European Convention, *supra* note 26, which provides: “Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State”; and Article 16(2) of the UK State Immunity Act, 1978, *supra* note 3, which states: “This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.”

⁷⁰⁷ Greek Judgment II, *supra* note 15, at 10.

⁷⁰⁸ *Id.* at 14–15.

⁷⁰⁹ *Id.* at 15.

⁷¹⁰ *Id.*

The Greek Supreme Court's decision is a substantial contribution to state immunity practice in itself. Yet it is perhaps more significant as a potential harbinger of developments in state immunity policy in other similarly oriented countries, which neither have enacted national immunity legislation nor are parties to the European Convention on State Immunity. For this group of states, the national courts possess the primary authority to define foreign state immunity law and many, like Greece, may be bound to look to international law for applicable guidance.⁷¹¹

A Critique of the Normative Hierarchy Theory

The misalignment of norms. Supporters of the normative hierarchy theory perceive the human rights litigation problem as a conflict between two international law norms, state immunity and *jus cogens*. In short, the superior norm of *jus cogens* is capable of striking down the inferior norm of state immunity, allowing the human rights victim to advance his or her claim.⁷¹² However, this approach is flawed conceptually because the norms that are purportedly at odds with one another under the normative hierarchy theory in reality never clash.

As part I demonstrated, state immunity is not a norm that arises from a fundamental principle of international law, such as state equality, or from the

⁷¹¹ Pursuant to Article 28(1) of the Greek Constitution, a generally accepted rule of international law constitutes an integral part of the Greek legal order, which may even supersede a contrary statutory provision. For a discussion of the status of international law under Greek law, see A. A. Fatouros, *International Law in the New Greek Constitution*, 70 AJIL 492, 501 (1976); Emmanuel Roucounas, *Grèce, in L'INTÉGRATION DU DROIT INTERNATIONAL ET COMMUNAUTAIRE DANS L'ORDRE JURIDIQUE NATIONAL* 287 (Pierre Michel Eisemann ed., 1996).

⁷¹² As Judge Wald stated:

[A] state is never entitled to immunity for any act that contravenes a *jus cogens* norm.... The rise of *jus cogens* norms limits state sovereignty "in the sense that the 'general will' of the international community of states, and other actors, will take precedence over the individual wills of states to order their relations."

Princz v. Federal Republic of Germany, 26 F.3d 1166, 1182 (D.C. Cir. 1994) (Wald, J., dissenting) (quoting Mary Ellen Turpel & Philippe Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 364, 365 (1988)).

latter's purported theoretical derivative, the maxim *par in parem non habet imperium*.⁷¹³ To reiterate briefly: The principle of state equality guarantees that states will enjoy equal *capacity* for rights. This capacity diminishes when a state intrudes on another state's sphere of authority, and becomes virtually dormant within another state's territorial borders. There is thus no inherent right of state immunity, as, ironically, is often suggested in the writings in support of the normative hierarchy approach.⁷¹⁴

Moreover, the practice by states of waiving adjudicatory jurisdiction to create immunity privileges has created binding norms through the development of international custom as to only a core body of state conduct. Such norms do not apply to state conduct, e.g., the violation of the human rights of another state's citizens, that undermines the aim and purpose of the international legal order. If a foreign state receives immunity protection for such conduct, it is because that protection is afforded by the domestic policies of the forum state or, in the case of a few select states, pursuant to the European Convention. Accordingly, the norms of state immunity and *jus cogens* do not clash at all insofar as human rights violations are concerned. To accept otherwise, as the normative hierarchy theory does, endows foreign states with more of a claim to state immunity than reality dictates.

If there is any clash of international law norms that underpins the human rights litigation problem, it is between human rights protections and the right of the forum state to regulate the authority of its judicial organs, otherwise known as the right of adjudicatory jurisdiction. As demonstrated in part I, as a threshold matter state immunity operates as an exception to the overriding principle of adjudicatory jurisdiction and as customary international law does not cover human rights offenses.⁷¹⁵ Any protections for human rights abuses on the

⁷¹³ See text at notes 28–116 *supra*.

⁷¹⁴ See, for example, the statement of the authors of *Implied Waiver Under the FSIA* in the text at note 184 *supra*; Judge Wald's dissent in *Princz*, 26 F.3d at 1181, maintaining that state immunity "hinges on the notion that a state's consent to suit is a necessary prerequisite to another state's exercise of jurisdiction." See also *Greek Judgment II*, *supra* note 15, at 3 (stating that state immunity is "a consequence of the sovereignty, independence, and equality of states and purports to avoid any interference with international affairs").

⁷¹⁵ See text at notes 74–104, 121–40 *supra*.

domestic level thus result purely from the exercise of the forum state's right of adjudicatory jurisdiction. That is, the forum state with ultimate authority to establish the entitlement of state immunity has chosen to close its courts to meaningful human rights litigation. Therefore, rather than being between *jus cogens* and state immunity, the real conflict is between *jus cogens* and the principle of adjudicatory jurisdiction.

Finally, even if state immunity were an international law norm that shields states from liability for human rights claims, the normative hierarchy theory would fail to explain persuasively how a clash of norms would arise. Lady Fox criticizes the theory, asserting that, as "a procedural rule going to the jurisdiction of a national court," state immunity "does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement."⁷¹⁶ Essentially, the norms of human rights and state immunity, while mutually reinforcing, govern distinct and exclusive aspects of the international legal order.⁷¹⁷ On the one hand, human rights norms protect the individual's "inalienable and legally enforceable rights.... against state interference and the abuse of power by governments."⁷¹⁸ On the other hand, state immunity norms enable state officials "to carry out their public functions effectively and... to secure the orderly conduct of international relations."⁷¹⁹ To demonstrate a clash of international law norms, the normative hierarchy theory must prove the existence of a *jus cogens* norm that prohibits the granting of immunity for violations of human rights by foreign states. However, the normative hierarchy theory provides no evidence of such a peremptory norm.

Questions surrounding the application of jus cogens. Unresolved issues surrounding the application of *jus cogens* further undermine the appeal of the

⁷¹⁶ FOX, *supra* note 15, at 525.

⁷¹⁷ Those who find a conflict between these norms have overlooked the fact that state immunity protection for human rights violations is not a product of international law.

⁷¹⁸ AKEHURST, *supra* note 6, at 209.

⁷¹⁹ FOX, *supra* note 15, at 1.

normative hierarchy theory.⁷²⁰ While the existence of *jus cogens* in international law is an increasingly accepted proposition, its exact scope and content remains an open question.⁷²¹ Proponents of the normative hierarchy theory, in particular, have failed to generate a precise list of human rights norms with a peremptory character.⁷²² To be sure, consensus is emerging as to the status of certain norms, such as the prohibitions against piracy, genocide, slavery, aggression, and torture.⁷²³ Yet these norms, despite their importance to the community of nations, represent only a small fraction of the norms that potentially may belong to the body of peremptory norms.⁷²⁴ In *Prefecture of Voiotia*, for example, the Greek courts identified the rights of family honor, life, private property, and religious convictions, enshrined in Article 46 of the Hague Regulations, as the operative *jus cogens*.⁷²⁵ Further, the concept of *jus cogens* is not confined solely to the realm of human rights. Commentators have suggested that crucial

⁷²⁰ The existence of *jus cogens* in international law is a highly contentious matter. See the presentation of opposing views on the topic in *Colloquy*, 6 CONN. J. INT'L L. 359, 359–69 (1988). To simplify matters, this article assumes the existence of *jus cogens*. It also assumes that *jus cogens* is effective outside the field of international treaty making, where the modern manifestation of the concept emerged. This, too, is a controversial assumption. Compare CHRISTOS L. ROSENSTEIN-ROZAKIS, THE PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*) UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES 15 (1973), with OPPENHEIM, *supra* note 6, at 8, and Andreas Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens—Some Critical Remarks*, 16 MICH. J. INT'L L. 433, 437–40 (1995). Note that the legitimacy of such assumptions has no bearing on the central thesis of this article, which does not hinge on the existence or nonexistence of *jus cogens*, but on the fact that state immunity protections for human rights violations are rooted in neither fundamental principles of international law nor international custom.

⁷²¹ See BROWNLIE (5th), *supra* note 6, at 516–17; OPPENHEIM, *supra* note 6, at 7.

⁷²² See Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!* 6 CONN. J. INT'L L. 1, 1 (1990) (noting facetiously that “the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power”); Karagiannakis, *supra* note 206, at 15–16 (ascribing immunity-piercing characteristics to the general category of “fundamental human rights”).

⁷²³ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), held that state-sanctioned torture violates *jus cogens*.

⁷²⁴ The body of literature considering the subject is rich. See, e.g., Antonio Gómez Robledo, *Le Jus cogens international: Sa genese, sa nature, ses fonctions*, 172 RECUEIL DES COURS 9–217 (1981 III); Levan A. Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, *id.* at 219–70; Giorgio Gaja, *Jus Cogens Beyond the Vienna Convention*, *id.* At 279–89; Gordon Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988).

⁷²⁵ Greek Judgment I, *supra* note 210, at 599; Greek Judgment II, *supra* note 15, at 15.

fundamental international law norms, such as *pacta sunt servanda*, may also constitute *jus cogens*.⁷²⁶

The undefined character of *jus cogens*,⁷²⁷ coupled with the general applicability of the normative hierarchy theory, which invests all peremptory norms with immunity-stripping potential, may present problems for the courts. Requiring application of the theory beyond cases of genocide, slavery, and torture would place national courts in an awkward position. The theory not only would deprive the forum state of its right to regulate access to its own courts,⁷²⁸ but also would force them to determine whether a particular norm of international law had attained the status of *jus cogens*, a task that international legal scholars have grappled with for decades with only limited success.⁷²⁹ Further, the normative hierarchy theory logically requires courts to treat all violations of peremptory norms uniformly, even violations of norms that do not implicate human rights but are arguably *jus cogens*, such as *pacta sunt servanda*. In addition, allowing the courts to determine the parameters of *jus cogens* through application of the normative hierarchy theory may undermine the principle of separation of powers, in some cases inappropriately transferring foreign-policymaking power from the political branches of government to the judiciary.⁷³⁰ Finally, as Judges Pellonpaa and Bratza warned in the *Al-Adsani* case, adoption of the normative hierarchy

⁷²⁶ See e.g., William J. Aceves, *The Vienna Convention on Consular Relations*, 31 VAND. J. TRANSNAT'L L. 257, 293 (1998). The American Law Institute maintains that "[i]t is generally accepted that the principles of the United Nations Charter prohibiting the use of force... have the character of *jus cogens*." RESTATEMENT, *supra* note 28, §102 cmt. K Professor Tunkin has even suggested that the Brezhnev doctrine, or "proletarian internationalism," as he describes it, is a *jus cogens* norm. GRIGORY TUNKIN, *THEORY OF INTERNATIONAL LAW* 444 (1974).

⁷²⁷ One may wish to criticize the normative hierarchy theory by capitalizing on this uncertainty, arguing that many human rights norms are not *jus cogens* and thus that the theory is unfounded. Such criticism is fruitless, however, as it simply provokes the equally sound and unprovable response that human rights norms *are* indeed peremptory in nature. For that reason, this article avoids challenging the normative hierarchy theory on these grounds.

⁷²⁸ Reimann, *supra* note 201, at 421.

⁷²⁹ For example, within the span of one case of interest, *Prefecture of Voiotia*, the Greek courts determined (without significant support) that Articles 43 and 46 of the 1907 Hague Regulations, *supra* note 213, were *jus cogens*. Greek Judgment I, *supra* note 210, at 599; Greek Judgment II, *supra* note 15, at 15.

⁷³⁰ This risk is perhaps most problematic in countries whose national legislatures have enacted immunity legislation. In this situation, application of the normative hierarchy theory by the courts may thwart the intent of the legislature.

theory could be the first step on a slippery slope that begins with state immunity from jurisdiction but could quickly extend to state immunity from execution against sovereign property and ultimately threaten the “orderly international co-operation” between states.⁷³¹

Second, if, as mentioned above, the true clash of norms underpinning the human rights litigation problem is between the protection of human rights and the principle of adjudicatory jurisdiction, what, then, is the relationship between these two norms? A thorough answer to this question cannot be offered in an article of this length, but a brief exploration of the issue may be enlightening.

If *jus cogens* is defined as a body of norms representing the core, nonderogable values of the community of states, then included in this body, arguably, is the principle of state jurisdiction, i.e., a state’s freedom to exercise jurisdiction, especially on the basis of territoriality, through its own governmental institutions, including its national courts.⁷³² Support for this proposition is reflected in the core principles of international law, which consider the state the basic building block of the international legal order.⁷³³ In fact, most of the foundational rules of international law hold as the highest value the protection of the territorial integrity, independence, and equality of states.⁷³⁴ Even taking account of recent

⁷³¹ ECHR Judgment, *supra* note 1, at 27. Immunity from execution is a topic distinct from immunity from judicial proceedings. For instance, even if a court denies a foreign state immunity and holds it liable to the plaintiff in a quantified amount of damages, the law may still bar the forced execution of the court’s judgment against the foreign state’s property. For a more in-depth explanation of immunity from execution, see BADR, *supra* note 16, at 107-12; Sinclair, *supra* note 68, at 218-42.

⁷³² Professor Scheuner has proposed three categories of *jus cogens* norms: (1) “the maxims of international law which protect the foundations of law, peace and humanity in the international order and which at present are considered by nations as the minimum standard for their mutual relations”; (2) “the rules of peaceful cooperation in the sphere of international law which protect fundamental common interests”; and (3) “norms regard[ing] the protection of humanity, especially of the most essential human rights.” Ulrich Scheuner, *Conflict of Treaty Provisions with a Peremptory Norm of General International Law, and Its Consequences*, 27 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 520, 526-27 (1967). Thus, it appears conceptually feasible that the principle of state jurisdiction, which arguably falls under one of the first two categories, could be *jus cogens* just like certain human rights norms, which fall under category three. See also Alexidze, *supra* note 237, at 260 (identifying “non-interference with domestic affairs” as *jus cogens*).

⁷³³ SHAW, *quoted in* note 40 *supra*, at 331 (further noting that “the principle whereby a state is deemed to exercise exclusive power over its territory can be regarded as a fundamental axiom of classical international law”).

⁷³⁴ *Id.* at 332.

developments in international law that limit state sovereignty, such as in the areas of human rights and environmental law,⁷³⁵ it cannot be said at this point in time that any rule has emerged that would limit a state's authority to determine its own jurisdiction over foreign states.⁷³⁶

If the principle of state jurisdiction is so paramount to the community of states as to place it within the body of *jus cogens*, the human rights litigation problem may involve a clash of two peremptory norms, the protection of human rights and the principle of exclusive state jurisdiction. This scenario raises perplexing questions of international law. Can there be a hierarchy of norms within the body of peremptory norms and, if so, which ranks higher, human rights or territorial jurisdiction? The answers to these questions, if any, lie deep in uncharted territory of international legal scholarship and cannot be ascertained here.⁷³⁷ The very fact that the normative hierarchy theory would appear to lead courts into such a theoretical abyss casts doubt on its practical viability and utility.

Denying immunity through fictions. Explaining how a state loses its immunity is a critical element of the normative hierarchy theory. Two different, but interrelated, explanations are offered in the literature. On one rationale, a state is said to waive or forfeit its entitlement to immunity by implication when it commits a *jus cogens* violation.⁷³⁸ On the other rationale, state conduct that violates a *jus*

⁷³⁵ See, e.g., HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950); Richard A. Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969 (1975).

⁷³⁶ In this regard, Justice Marshall's age-old words in *The Schooner Exchange* still ring true: Jurisdiction is exclusive and absolute; any exceptions to the jurisdiction of a state must be based on its consent. See text at note 72 *supra*. Also, as editors Jennings and Watts admonish, limitations on state jurisdiction may not be presumed. OPPENHEIM, *supra* note 6, at 391.

⁷³⁷ When *jus cogens* norms clash, it "raises questions-to which no firm answer can be given-of the relationship between rules of *ius cogens*, and of the legitimacy of an act done in reliance on one rule of *ius cogens* but resulting in a violation of another such rule." OPPENHEIM, *supra* note 6, at 8. "If a state uses force to implement the principle of self-determination, is it possible to assume that one aspect of *jus cogens* is more significant than another?" BROWNLIE (5th), *supra* note 6, at 517.

⁷³⁸ The concept of "waiver" emerged from American experience. Some have argued that a state's violation of *jus cogens* implicates §1605(a)(1) of the FSIA, the so-called waiver exception, under which a foreign state implicitly waives its entitlement to immunity. See, e.g., Belsky et al., *supra* note 181, at 394-401. U.S. courts have consistently rejected this argument, refusing to interpret the waiver exception so broadly. In *Princz v. Federal Republic of Germany*, for example, the court held that the "*jus cogens* theory of implied

cogens norm is said to fall outside the category of protected state conduct known as *acta jure imperii*, for which immunity is traditionally granted, such conduct being devoid of legitimacy because it contravenes the will of the community of nations.⁷³⁹

Neither of these explanations is persuasive because both are based on fictions resulting from a misunderstanding of the true nature and operation of the doctrine of foreign state immunity.

The notion that a foreign state implicitly waives or forfeits any entitlement to immunity by acting against *jus cogens* is untenable for the reasons developed in part I: a foreign state's entitlement to immunity for human rights violations is not derived from international law, so a foreign state cannot lose its right to immunity by violating international law. Indeed, the entitlement in this respect-and therefore also the waiver or forfeiture of immunity-is strictly a matter of domestic regulation. This plain reality is illustrated in *Smith v. Socialist People's Libyan Arab Jamahiriya*, in which Libya conceded, for the limited purpose of its appeal, that its alleged participation in the bombing of Pan Am Flight 103 would consist of a *jus cogens* violation, but disputed that "such a violation demonstrates an implied waiver of sovereign immunity within the meaning of the FSIA."⁷⁴⁰ The court

waiver is incompatible with the intentionality requirement implicit in §1605(a)(1)." The court went on to say that this requirement is "reflected in the examples of implied waiver set forth in the legislative history of §1605(a)(1), all of which arise either from the foreign state's agreement (to arbitration or to a particular choice of law) or from its filing a responsive pleading without raising the defense of sovereign immunity." 26 F.3d 1166, 1174 (D.C. Cir. 1994); *see also* Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1150-51 (7th Cir. 2001); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244 (2d Cir. 1996). Indeed, the legislative history of the FSIA contemplates only a few types of implicit waivers: "where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract.... [or] where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." HOUSE REPORT, *supra* note 107, at 18. The American Bar Association has recently recommended amending the FSIA "to limit circumstances under which waivers may be implied." Working Group of the American Bar Association, *Report, Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 546 (2002). The idea of "forfeiture" of immunity by a foreign state is a European creation, developed outside the statutory context, which some have argued operates as part of the general principles of international law. *See, e.g.,* Kokott, *supra* note 206.

⁷³⁹ For example, in *Prefecture of Voiotia*, the court of first instance held that state acts in breach of *jus cogens* could not qualify as sovereign acts because the state would not be considered as acting within its capacity as sovereign. *See* b) in text at note 214 *supra*; *see also* Paech, *supra* note 206, at 394; Belsky et al., *supra* note 181, at 377.

⁷⁴⁰ *Smith*, 101 F.3d at 242.

ultimately held that Libya had not waived its immunity because the FSIA anticipated implied waiver only under a few select circumstances.⁷⁴¹ *Smith*, while adjudicated under national immunity legislation, is of general appeal, if only to raise the paradoxical question of how a foreign state can be said to have implicitly waived its entitlement to immunity when it would be likely, if asked, expressly to state the contrary.⁷⁴²

The purported exclusion of state-sponsored human rights violations from the category of *acta jure imperii* is equally unpersuasive. Indeed, the distinction between *acta jure imperii* and *acta jure gestionis* is “superficially attractive as a means of keeping state immunity within reasonable limits” but “does not rest on any sound logical basis.”⁷⁴³ As Judge Gerald Fitzmaurice wrote, “[A] sovereign state does not cease to be a sovereign state because it performs acts which a private citizen might perform.”⁷⁴⁴ Along similar lines of logic, a foreign state does not cease to be a sovereign state simply because it commits acts of a criminal nature, including violations of human rights norms. Moreover, if state conduct that violates *jus cogens* is assertedly not *jure imperii* and obviously not *jure gestionis* (private or commercial), then what is it? This question is not addressed by supporters of the normative hierarchy theory. The real answer lies in the fact that foreign states are entitled to immunity for human rights violations only to the extent that a forum state grants them that privilege. Hence, the exclusion of *jus cogens*-violating state conduct from the category of *acta jure imperii* can be effectuated only through the expression of the forum state’s immunity policies to that effect, not by international law.

Misplaced concerns regarding forum state complicity. Supporters of the normative hierarchy theory sometimes argue that the failure to deny state

⁷⁴¹ *Id.* at 244.

⁷⁴² See 15 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶104.12[1][a] (3d ed. 2003) (“Courts will rarely find that a nation has waived its sovereign immunity without strong evidence that waiver was what the state intended.”).

⁷⁴³ BRIERLY, *supra* note 75, at 250; see also Lauterpacht, *supra* note 27, at 224.

⁷⁴⁴ G. G. Fitzmaurice, *State Immunity from Proceedings in Foreign Courts*, 1933 BRIT. Y.B. INT’L L. 101, 121; see also Lauterpacht, *supra* note 27, at 224.

immunity for human rights violations amounts to complicity of the forum state with the *jus cogens* transgression.⁷⁴⁵ A brief review of the ILC's draft articles on state responsibility reveals the shortcomings of this claim. Of the provisions in the draft articles, only chapter IV on the responsibility of a state in connection with the act of another state is even remotely relevant. Articles 16, 17, and 18 of chapter IV address, respectively, situations in which one state aids or assists, directs and controls, or coerces another state in the commission of an internationally wrongful act.⁷⁴⁶ In all these provisions, the ILC included a knowledge requirement for complicity of the third-party state, thus limiting the draft articles' contemplated application to cases of deliberate involvement in the internationally wrongful act before or during its commission.⁷⁴⁷ Hence, a forum state cannot be considered complicit for granting jurisdictional immunity to other states long before any lawsuit has been filed.⁷⁴⁸

This does not mean, however, that the forum state cannot hold the foreign-state offender accountable under principles of state responsibility, only that it cannot be penalized for failing to do so.⁷⁴⁹ Moreover, immunity in the forum state does not amount to global impunity for state conduct that violates human rights. Indeed, the forum state may pursue a human rights claim in numerous alternative political and judicial arenas. Nevertheless, repealing immunity protections that

⁷⁴⁵ See, for example, point d) in the court of first instance's opinion in *Prefecture of Voiotia*, in text at note 214 *supra*. See also Paust, *supra* note 201, at 227; Vivekananthan, *supra* note 202, at 147.

⁷⁴⁶ A state is internationally responsible under Article 16 when it aids or assists another state in committing, or under Article 17, when it directs and controls another state in committing, an internationally wrongful act if "(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State." Under Article 18, "A State which coerces another State to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) the coercing State does so with knowledge of the circumstances of the act." Draft Articles on Responsibility of States for Internationally Wrongful Acts, Arts. 16–18, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <<http://www.un.org/law/ilc>>, reprinted in CRAWFORD, *infra* note 261.

⁷⁴⁷ See *supra* note 258.

⁷⁴⁸ For examples of the application of Articles 16, 17, and 18, see JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 148–58 (2002).

⁷⁴⁹ Draft Articles 42 and 48 permit a state to invoke another state's responsibility for injury either to one of the forum state's citizens or, arguably, to a foreign state's citizens.

exist solely by virtue of the forum state's domestic policies and are not compelled by international law ranks high among all options.

8.5 New Prospects for the Progressive Development of Foreign State Immunity Law

As demonstrated above, the normative hierarchy theory offers an unpersuasive solution to the human rights litigation problem. Foreign states are not immune from human rights litigation by virtue of a fundamental sovereign right or a rule of customary international law.⁷⁵⁰ With ultimate authority both to grant and to rescind the entitlement to immunity in these circumstances, the forum state may establish a state immunity policy in this area unrestricted by international law. This reality places the burden of providing meaningful human rights litigation not on the foreign state defendant, as the normative hierarchy theory contends, but on the government entities in each forum state with responsibility for establishing the state immunity laws.

While the forum state has authority to repeal many state immunity privileges, especially in the area of human rights protections, by exercising its right of adjudicatory jurisdiction, a more comprehensive justification for curtailing immunity is in order. Although an international rule of immunity exists, the modern doctrine of foreign state immunity fails to delineate the scope of its coverage. Accordingly, the line between international law and domestic law protections is not always readily apparent. Neither the traditional *gestionis/imperii* distinction of the theory of restrictive immunity nor the piecemeal approach of national and international codification efforts of national state immunity legislation accurately distinguishes between immune and nonimmune state conduct. These approaches, as explained, focus primarily on establishing categories of nonimmune conduct and in so doing promote excessive state immunity protections.

⁷⁵⁰ However, the European Convention, *supra* note 26, requires a small group of states to provide immunity protections as a matter of international obligation.

Part III proposes an alternative approach to allocating state immunity entitlements. The approach justifies granting immunity only in circumstances in which such protection promotes orderly relations in the community of states, not least between the forum state and the foreign state. As explained in more detail below, state conduct that does not enhance interstate relations, such as the abuse of citizens of the forum state, should not be entitled to immunity protection.

Developing a Theory of Collective Benefit

One way to identify the scope of the international rule of state immunity is to conceptualize state immunity as arising out of an agreement forged between the forum state and any foreign state with which it seeks to develop transnational intercourse. This approach is consistent with the more persuasive rationale for state immunity, i.e., that immunity protections result from the forum state's waiver of its right of adjudicatory jurisdiction. As Justice Marshall observed in *The Schooner Exchange*, state immunity protections were originally created when the forum state granted a foreign sovereign a "license" to operate within the forum state's jurisdiction free from arrest, seizure, or adverse legal proceedings.⁷⁵¹ To the extent that this practice has crystallized into international custom, the forum state has consented to concede a right of adjudicatory jurisdiction on an enduring basis. Thus, defining the scope of the international rule of state immunity depends upon determining the circumstances in which forum states have conceded their important right of adjudicatory jurisdiction permanently in favor of immunity protections.

A look at the "agreement" that states have struck with one another regarding state immunity protections is revealing. Traditionally, a forum state's promise of foreign state immunity has provided foreign states with guarantees against arrest, seizure, and adverse legal proceedings sufficient to entice foreign sovereigns and their representatives into entering and operating within the forum state's jurisdiction. This promise of immunity, however, is not limitless in scope. As Justice Marshall observed, state immunity exists only for the "mutual benefit"

⁷⁵¹ *The Schooner Exchange*, 11 U.S. at 137.

of “intercourse” between states and for “an interchange of those good offices which humanity dictates and its wants require.”⁷⁵² Recently, the decision in the *Arrest Warrant* case confirmed this justification for state immunity in the context of immunities of foreign ministers. The ICJ found that such immunities are designed to enable the ministers to fulfill their functions effectively and to protect them from acts of authority of another state that would thwart them in fulfilling those functions.⁷⁵³ Accordingly, the sole *raison d’être* for state immunity under customary international law is so that states can perform their public functions effectively and ensure that international relations are conducted in an orderly fashion.⁷⁵⁴

If one accepts this basic premise, then conduct of a foreign state that does not conform with the development of beneficial interstate relations falls outside the state immunity “agreement” and thus is not immune by virtue of international custom. The most obvious example excludes foreign state conduct that does significant harm to the vital interests of the forum state, such as the commission of human rights abuses against the forum state’s nationals. Accordingly, the basic test for distinguishing between immune and nonimmune transactions should not be whether the state conduct is public or private, as the theory of restrictive immunity requires, but whether such conduct would substantially harm the vital interests of the forum state.⁷⁵⁵ Within these parameters, the forum state can more accurately define its domestic state immunity laws in accordance with customary international law requirements.

Although the forum state has wide discretion to modify its state immunity laws so as to provide better judicial access to human rights victims, certain important

⁷⁵² *Id.* at 136.

⁷⁵³ *Arrest Warrant*, *supra* note 23, paras. 52, 54.

⁷⁵⁴ *FOX*, *supra* note 15, at 1.

⁷⁵⁵ The exact parameters of beneficial interstate conduct are variable and likely to depend on the immunity policies of each individual state. One can safely argue, however, that the protection of the forum state’s “vital interests” is a universal common denominator in application of the state immunity agreement. Professor Lauterpacht, while similarly believing that the immunity of foreign states may be greatly curtailed, followed a different approach. He contended that immunity should be maintained in respect of four areas: (1) the legislative acts of foreign states; (2) the executive and administrative acts of the foreign state within its territory; (3) certain contracts forged with foreign states; and (4) diplomatic immunities. Lauterpacht, *supra* note 27, at 237–39.

limitations still condition the forum state's approach. First, any changes in domestic state immunity policy must be consistent with the international rules of adjudicatory jurisdiction. Since state immunity, as a threshold matter, is an exception to adjudicatory jurisdiction, the absence of jurisdiction over state conduct would eliminate the state immunity question altogether.⁷⁵⁶ Thus, when opening up domestic courts to human rights litigation, it is necessary to ensure maintenance of an appropriate connection between the dispute and the forum state under international law.⁷⁵⁷

Second, the forum state, like the foreign state, belongs to a community of states and must abide by community rules, the rules of international law. For example, several principles restraining state behavior are enshrined in the United Nations Charter; they include, among others, the obligation to uphold the principles of sovereign independence, the peaceful settlement of disputes, and the protection of human rights.⁷⁵⁸ Thus, any alteration in state immunity law that unjustifiably endangers peaceful relations may be unlawful. This consideration would preclude, for example, collusion between the forum state and the defendant state to commit a crime that is mutually beneficial to them but outlawed by international law.⁷⁵⁹ Additional obligations will likely arise out of international agreements to which the forum state is a party or out of customary international law.⁷⁶⁰

Applying the Theory of Collective State Benefit

Two recent developments in state immunity law, in the United States and Greece, exemplify the legitimate restrictions on immunity that states seeking to

⁷⁵⁶ See Arrest Warrant, *supra* note 23, para. 46.

⁷⁵⁷ See discussion *supra* note 47.

⁷⁵⁸ UN CHARTER pmbL., Arts. 1, 2.

⁷⁵⁹ See text at notes 258–62 *supra*.

⁷⁶⁰ A recent example appears in *Roeder v. Iran*, 195 F.Supp.2d 140 (D.D.C. 2002). There, the court held that executive agreements entered into by the United States and Iran, known as the “Algiers Accords,” barred the FSIA claims of former hostages detained at the U.S. Embassy in Tehran. Indeed, some scholars maintain that conflicts between human rights and state immunity may be best resolved “through the ratification of human rights conventions and the submission to international procedures of supervision such as those provided by the UN Covenants.” SCHREUER, *supra* note 114, at 60.

advance human rights litigation may impose in accordance with the theory of collective state benefit. As mentioned above, in 1996 the U.S. Congress amended the FSIA by creating an additional exception to the immunity of certain foreign states for a limited range of human rights violations.⁷⁶¹ Notably, the newest FSIA exception requires no territorial connection to the United States.⁷⁶² Instead, jurisdiction is predicated on the American nationality of the victim or the claimant.⁷⁶³ The new exception is consistent with the theory of collective state benefit in that it stands to protect one of the most vital interests of the democratic state, the well-being of its citizenry.⁷⁶⁴ Indeed, the scope of the exception could arguably be broader, consistent with the theory, and could extend to a broader class of potential foreign state defendants, not only those designated as sponsors of terrorism.⁷⁶⁵

The second development is the Greek Supreme Court's decision in *Prefecture of Voiotia*, discussed earlier,⁷⁶⁶ which held the Federal Republic of Germany liable for Nazi acts of aggression against the civilian population of southern Greece. In addition to its misguided acceptance of the normative hierarchy theory, the case is notable for its advancement of the so-called torts exception to immunity. As indicated above, the Court ruled that "national courts have jurisdiction to adjudicate damages, including compensation for offenses against people or

⁷⁶¹ 28 U.S.C. §1605(a)(7) (2000).

⁷⁶² As noted, the amendment covers even "the provision of material support or resources" for the proscribed conduct, which could occur in the foreign state defendant's own territory. *Id.*

⁷⁶³ Brief for the United States as Amicus Curiae at 27–28, *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996) (Nos. 95-7931, 95-7942). The brief states:

[B]y specifying that the victim and claimant must be a national of the United States..., the legislation ensures that, where United States courts assume jurisdiction over a foreign sovereign, there is a nexus to the United States. This limitation balances the United States' interest in providing a forum for American victims of specified outrageous conduct against the interest of foreign governments in not being forced to defend actions with no connections to the U.S.

Id. (citation omitted).

⁷⁶⁴ However, the law may raise some concerns in cases in which the claimant was a U.S. national but the victim was not, e.g., a married couple of mixed nationality. In these cases, the competence of U.S. courts is predicated on an arguably weaker basis of jurisdiction.

⁷⁶⁵ For a criticism of the limited scope of the exception, see Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?* 16 BERKELEY J. INT'L L. 71, 81–82 (1998).

⁷⁶⁶ See text at notes 216–24 *supra*.

property that took place in the territory of the forum by organs of a foreign country that was present in the territory when the offense took place, even if it was *acta jure imperii*.”⁷⁶⁷ In this regard, *Prefecture of Voiotia* not only adds to the corpus of law defining the torts exception to immunity, but also contributes to the growing consensus that such an exception has application even in cases of abuse of sovereign power.⁷⁶⁸

The second contribution of *Prefecture of Voiotia*, really an extension of the first, is its recognition that even in the field of armed conflict a state is not immune when it abuses its official power to the detriment of citizens of the forum state. The Court noted that the commentary to Article 12 of the ILC draft articles, Article 31 of the European Convention, and section 16(2) of the UK State Immunity Act all indicate a rule of customary international law that entitles states to immunity in regard to military activity.⁷⁶⁹ The Court determined, however, that this rule contained a significant exception “for damages arising from crimes, such as crimes against humanity, that affect, not necessarily as a consequence of war, particular civilians, not civilians at large and which civilians have no connection with that armed conflict during military occupation.”⁷⁷⁰ In the context of that case, the Court concluded: “[T]here is no state immunity from criminal acts of the organs of the occupying power that take place by abusing their sovereign power

⁷⁶⁷ Greek Judgment II, *supra* note 15, at 7.

⁷⁶⁸ This aspect of the torts exception has developed primarily in the context of §1605(a)(5) of the U.S. FSIA. That provision denies immunity to a foreign state “for personal injury or death.... occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.” The torts exception does not apply, however, to claims based upon the exercise of or failure to exercise a discretionary function. 28 U.S.C. §1605(a)(5)(A). In two cases already discussed, U.S. courts found that violations committed by foreign government agents in U.S. territory were outside the application of the discretionary function exception and thus denied the defense of immunity. *See Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (the commission of murder by foreign government agents in violation of foreign law did not trigger the discretionary function exemption); *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.D.C. 1980) (the assassination committed in the United States by Chilean government agents was not covered by the discretionary function exemption). For further discussion, see SCHREUER, *supra* note 114, at 57–61; Trooboff, *supra* note 18, at 357–62.

⁷⁶⁹ Greek Judgment II, *supra* note 15, at 10.

⁷⁷⁰ *Id*

as reprisals for acts of resistance movements against innocent and nonparticipant persons.”⁷⁷¹ The Court continued:

[T]he torts in question (murders that also constitute crimes against humanity) were directed against specific persons limited in number who resided in a specific place, who had nothing to do with the resistance activity resulting in the death of German soldiers taking part in a terror operation against the local population.... [They were] hideous murders that objectively were not necessary in order to maintain the military occupation of the area or subdue the underground action, carried out in the territory of the forum by organs of the German Third Reich in an abuse of sovereign power.⁷⁷²

Prefecture of Voiotia conforms with the theory of collective state benefit for many of the same reasons as the 1996 FSIA amendment. The infliction of wanton terror on Greek civilians by the Nazis during World War II was a direct affront to the vital interest of Greece, the forum state. Regardless of the label it bears, sovereign, military, *jure imperii*, or otherwise, a foreign state’s unlawful killing of the forum state’s civilians destroys bilateral relations between forum and foreign state and may even jeopardize the security and stability of the community of states. Thus, putting aside its endorsement of the normative hierarchy theory, *Prefecture of Voiotia* represents a legitimate solution to the human rights litigation problem.⁷⁷³

⁷⁷¹ *Id.*

⁷⁷² *Id.* at 14–15.

⁷⁷³ Still, *Prefecture of Voiotia* is susceptible to some criticism. First, the Greek government arguably failed to provide adequate notice to the Federal Republic of Germany of the change in Greek state immunity policy. This fault is in large measure a function of Greece’s lack of national immunity legislation. Absent an effective means of communication, i.e., through the promulgation of public laws, the affected state or states learns of modifications in state policy only at the moment the policy-changing judicial decision is rendered. Without fair warning, *Prefecture of Voiotia* came as a shock to the German government, evoking strong diplomatic protestation. See Atkins & Wiesmann, *supra* note 215. Recent efforts to enforce the Greek Judgment in Germany were denied. The Distomo Massacre Case (Greek Citizens v. FRG) (Fed. Sup. Ct. June 26, 2003), translated in 42 ILM 1030 (2003). Second, *Voiotia* failed to place limits on the retroactivity of the new immunity rule. Indeed, the claims at issue arose out of wartime events occurring in 1944, more than fifty years before the suit was filed. The adjudication of claims of this nature, especially those possibly addressed previously by postwar reparations treaties, is likely to cause instability in bilateral relations. Indeed, following World War II, the German government paid the Greek government DM 115 million in compensation for victims

Taken together, the 1996 FSIA amendment and *Prefecture of Voiotia* demonstrate that progress can be made in resolving the human rights litigation problem in a manner consistent with the true nature of the doctrine of foreign state immunity. That is to say that the forum state, through the agent it designates to create and interpret foreign state immunity law (the U.S. Congress in the case of the 1996 amendment and the Hellenic Supreme Court in the case of *Prefecture of Voiotia*), is empowered to modify foreign state immunity law to an extent consistent with the theory of collective state benefit. These developments further show that such modifications are possible in two very different legal settings: the 1996 amendment arose in a common law country with national immunity legislation, while *Prefecture of Voiotia* resulted from the jurisprudential application of international law in a civil law country without national immunity legislation.

8.6 CONCLUSION

State immunity is the product of a conflict between two international law principles, sovereign equality and adjudicatory jurisdiction, which conflict is resolved more persuasively in favor of adjudicatory jurisdiction. Thus, state immunity exists as an exception to the overriding principle of adjudicatory jurisdiction.

The awkward development of the doctrine of foreign state immunity in the twentieth century, which derived from the myth that states once enjoyed absolute immunity from suit, has, however, distorted the perception of how state immunity operates. Today, the prevailing formulation of state immunity laws improperly reverses the presumption of adjudicatory jurisdiction by establishing a catchall rule of immunity. Consequently, in many national jurisdictions state immunity

laws grant foreign state defendants more protection than customary international law requires.

With respect to certain core state conduct, the practice of waiving adjudicatory jurisdiction has crystallized into a rule of customary international law binding on states. While the existence of a rule of customary international law concerning state immunity is firmly established, the exact scope of this rule is difficult to discern. Nevertheless, despite uncertainty at the edges, sufficient evidence testifies that customary international law does not compel immunity protections for state conduct that violates human rights. Any immunity that a foreign state receives for such conduct is solely conferred by domestic laws.

The normative hierarchy theory offers an unpersuasive solution to the human rights litigation problem. The theory assumes a clash of international law norms of human rights and state immunity that, in fact, does not occur. There is no international norm of state immunity that shields foreign states from human rights litigation and, even if there were, the normative hierarchy theory fails to explain persuasively how human rights norms can trump state immunity norms when the two types of norms govern mutually exclusive types of state conduct. The real source of the human rights litigation problem is the forum state's failure to exercise its right of adjudicatory jurisdiction with respect to human rights cases. However, this problem is rather difficult to resolve on a theory of normative hierarchy, as the real conflict may involve a clash of two peremptory norms of international law, human rights and adjudicatory jurisdiction.

Finally, because state immunity is at its root an exception to the overriding principle of adjudicatory jurisdiction, the forum state may exercise its right of adjudicatory jurisdiction to curtail any excess state immunity privileges that do not emanate from international law, including protections for human rights violations. A theory of collective state benefit guides the process of repealing extraneous immunity protections and draws the line between immune and nonimmune conduct more appropriately than the normative hierarchy theory. On the collective state benefit theory, state conduct that fails to enhance interstate

relations, particularly between the forum state and the foreign state, does not warrant immunity protection. The clearest example of this kind of conduct is activity by the foreign state defendant that harms the vital interests of the forum state, such as abuse of the citizens of the forum state.

CHAPTER 9

THE POSITION OF INTERNATIONAL TRIBUNALS AND NATIONAL COURTS REGARDING THE DEFENCE OF SOVEREIGN IMMUNITY MADE BY VARIOUS HEADS OF STATES

9.1 INTRODUCTION

Professor Dinstein asserts that “[s]ince time immemorial, international law has allowed other States⁷⁷⁴ . . . to prosecute persons . . . for war crimes.”⁷⁷⁵ Of course this simple assertion raises two further questions: (1) What are “war crimes”? (2) Under what theory of jurisdiction may any State prosecute war criminals?⁷⁷⁶

In response to the first question, Article 8(2) of the 1998 Rome Statute, establishing the International Criminal Court (ICC), “contains an extensive⁷⁷⁷ list of acts constituting war crimes over which the ICC has jurisdiction.”⁷⁷⁸ The list includes: eight “[g]rave breaches of the Geneva Conventions”;⁷⁷⁹ twenty-six “[o]ther serious violations of the laws and customs applicable in international armed conflict”;⁷⁸⁰ four “serious violations” of common article 3 for non-

⁷⁷⁴ This article uses the term “State” to refer to a country or nation-State.

⁷⁷⁵ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 228 (Cambridge University Press 2004).

⁷⁷⁶ It is important to distinguish between “war criminals” (universal jurisdiction over which is the topic of this article) and “unlawful combatants” (which is beyond the scope of this article). *Id.* at 233-37.

⁷⁷⁷ Professor Dinstein considers Article 8(2)’s list “[t]he most recent-and most detailed- definition of war crimes....” *Id.* at 230.

⁷⁷⁸ DOCUMENTS ON THE LAWS OF WAR 668 (Adam Roberts and Richard Guelff eds., Oxford University Press 3rd ed. 2000). *See also Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session*, 6 May-26 July 1996, GAOR, 51st Sess., Supp. No. 10, at 41, U.N. Doc. A/51/10 (1996), Art. 20, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf (last visited Apr. 10, 2006) [hereinafter *ILC 1996 Draft Code*].

⁷⁷⁹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, Art. 8(2)(a), available at <http://www.un.org/law/icc/statute/romeofra.htm> (last visited Apr. 10, 2006) [hereinafter *Rome Statute*].

⁷⁸⁰ *Id.* at Art. 8(2)(b).

international armed conflicts;⁷⁸¹ and twelve “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character.”⁷⁸²

Regarding the jurisdictional basis for any State to prosecute war crimes, “[i]t is generally agreed that customary international law imposes limits on a nation’s prescriptive jurisdiction” to five principle jurisdictional bases⁷⁸³: (1) territoriality;⁷⁸⁴ (2) nationality;⁷⁸⁵ (3) protective principle;⁷⁸⁶ (4) passive personality;⁷⁸⁷ and (5)

⁷⁸¹ *Id.* at Art. 8(2)(c).

⁷⁸² *Id.* at Art. 8(2)(e). It is interesting to note that in the Rome Statute, Article 8 is by far the longest and most detailed article defining the crimes within the ICC’s jurisdiction. The other crimes currently within the jurisdiction of the ICC are genocide (Article 6), crimes against humanity (Article 7), and the crime of aggression, the latter of which is, as of yet, undefined. *Id.* at Art. 5(2). The length and level of detail in Article 8 defining war crimes appears to be primarily due to the complexity and breadth of the modern Law of War (a.k.a. Law of Armed Conflict (LOAC), a.k.a. *jus in bello*) as it has evolved via the entry into force of multilateral treaties and crystallization of customary international law, and less due to the intent of the Rome Conference to “single out” war crimes for special attention.

⁷⁸³ CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW*, 534 (2003). *See* *United States v. Yunis*, 681 F. Supp. 896, 899-903 (D.D.C. 1988) (describing the five traditional bases of jurisdiction over extraterritorial crimes). This very brief summary of jurisdictional bases necessarily conflates “prescriptive” jurisdiction with “enforcement” jurisdiction, which are, from a theoretical basis, quite distinct.

“Jurisdiction may describe a state’s authority to make its law applicable to certain actors, events, or things (legislative [a.k.a. prescriptive] jurisdiction); a state’s authority to subject certain actors or things to the processes of its judicial or administrative tribunals (adjudicatory jurisdiction); or a state’s authority to compel certain actors to comply with its laws and to redress noncompliance (enforcement jurisdiction).”

Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786 (1988).

⁷⁸⁴ Territorial jurisdiction can be further broken down into “objective” territorial jurisdiction, based on conduct occurring within a State’s territory, versus “subjective” territorial jurisdiction, based upon conduct occurring outside a State’s territory, but which has, or intends to have, a substantial effect within the State’s territory. David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005).

⁷⁸⁵ A State may prescribe law with regard to the conduct of its own *nationals*, both within and outside its territory. *Id.* “Under customary international law, nations have almost unlimited authority to regulate the conduct of their own nationals around the world.” BRADLEY & GOLDSMITH, *supra* note 10, at 535.

⁷⁸⁶ BRADLEY & GOLDSMITH, *supra* note 10, at 534; David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005).

⁷⁸⁷ BRADLEY & GOLDSMITH, *supra* note 10, at 534; David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005).

The most controversial category of prescriptive jurisdiction is the passive personality category, which would allow nations to assert jurisdiction over aliens who injure their nationals abroad. Historically the United States disputed the validity of this category of jurisdiction, but in recent

universality.⁷⁸⁸ The first four types of jurisdiction are subject to a nexus or “reasonableness” requirement, which is that the State’s exercise of jurisdiction must be “reasonable” vis-à-vis another State’s desire to exercise jurisdiction.⁷⁸⁹ However, the exercise of *universal* jurisdiction need not be “reasonable,”⁷⁹⁰ (or at least need not show a nexus in order to be reasonable) because, “[u]niversal jurisdiction allows any nation to prosecute offenders for certain crimes even when the prosecuting nation lacks a traditional nexus with either the crime, the alleged offender, or the victim.”⁷⁹¹ This is because “the universality principle assumes that every state has an interest in exercising jurisdiction to combat egregious

years, the United States and other countries have increasingly relied upon this category of jurisdiction as a basis for regulating terrorist attacks on their citizens.

BRADLEY & GOLDSMITH, *supra* note 10, at 535.

⁷⁸⁸ A State may prescribe law with regard to certain criminal acts recognized by the international community, such as piracy, slavery, genocide, aircraft hijacking, and possibly terrorism after the attacks on 11SEP2001. David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005). *See, e.g., In re Extradition of Demjanjuk*, 612 F. Supp. 544, 558 (ND OH 1985), *affirmed sub nom. Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (finding that Israel had properly asserted jurisdiction over “Ivan the Terrible” under the protective, passive personality, and universality principles).

⁷⁸⁹ Factors to be considered in assessing the reasonableness of a particular exercise of jurisdiction would include:

the connection between the regulating state’s territory and the regulated activity, the connection between the regulating state and the person being regulated, the importance of the regulation to the regulating state, the importance of the regulation to the international political, legal or economic system, the extent to which the regulation is consistent with the traditions of the international law system, the extent to which another state may have an interest in regulating, and the likelihood of conflict with the regulations of another nation.

BRADLEY & GOLDSMITH, *supra* note 10, at 535. Although most States are circumspect in exercising jurisdiction over non-nationals under the theory of reciprocity, if a State was to assert a form of jurisdiction that was perceived to be unreasonable, other States could assert diplomatic protests or *demarches* in response.

⁷⁹⁰ Chandra L. Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT’L L. REV. 301, 316 (2003). *Accord* BRADLEY & GOLDSMITH, *supra* note 10, at 536 (noting that only universal jurisdiction does not require a territorial or nationality connection between the regulating nation and the conduct, offender or victim). *See also* Randall, *supra* note 10, at 788. However, at least one author sees the exercise of universal jurisdiction as an “abrogation of sovereignty,” at least as applied by domestic courts. M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT’L L. 1069, 1127-29 (1999).

⁷⁹¹ Randall, *supra* note 10, at 785. *See also* BRADLEY & GOLDSMITH, *supra* note 10, at 536 (noting that “most U.S. criminal statutes expressly or implicitly require a connection to the United States or a U.S. national and thus do not assert universal jurisdiction.”); *id.* (noting that although a U.S. federal torture statute asserts universal jurisdiction by criminalizing “acts of official torture committed in foreign nations by foreign citizens . . . But there are no reported cases applying that statute.”).

offenses that states universally have condemned.”⁷⁹² Each State is essentially acting to vindicate the international community’s interests in prosecuting these offenses.⁷⁹³ Thus, the *sine qua non* of exercising universal jurisdiction would seem to be the punishment of *international crimes*.⁷⁹⁴

These raises the further question of which specific crimes may be considered international in scope, and therefore justify the application of universal jurisdiction by any State? Some commentators define the crimes that are subject to universal jurisdiction as “certain heinous and widely condemned offenses”⁷⁹⁵ or “the most atrocious offenses.”⁷⁹⁶ Of course, the mere fact that every State criminalizes certain conduct (e.g. rape and murder) is not a sufficient condition—the crime must threaten the international system as a whole if it were to go unpunished,⁷⁹⁷ or the prohibited acts must be of an international character⁷⁹⁸ and

⁷⁹² Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 384 (2001).

⁷⁹³ Sriram, *supra* note 17, at 316.

⁷⁹⁴ See, e.g., Rome Statute, *supra* note 6, at Preamble: “Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” See also, Randall, *supra* note 10, at 827-829; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 reporter’s note 1 (1987); *Report of the International Law Commission on the work of its second session*, 5 U.N. GAOR, Supp. 12, pt. 111, U.N. Doc. A/1316 (1950) (The “Nuremberg Principles” describe crimes against peace, war crimes, and crimes against humanity as “international crime[s]”).

⁷⁹⁵ DUNOFF, RATNER & WIPPMAN, *infra* note 181, at 353.

⁷⁹⁶ Brief of Amicus Curiae Human Rights Watch, *Doe v. Karadzic*, No. 93 Civ. 0878 192 F.R.D. 133 (S.D.N.Y. 2000), available at <http://www.yale.edu/lawweb/avalon/diana/karadzic/1june.htm> (last visited Apr. 10, 2006).

⁷⁹⁷ Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) (joint separate opinion of Higgins, J., Kooijmans, J., and Buergenthal, J.), available at http://www.icj-cij.org/icjwww/idocket/ICJBE/icobejudgment/icobe_ijudgment_20020214.PDF (last visited Mar. 12, 2006).

⁷⁹⁸ Some writers argue that universal jurisdiction exists only over *jus cogens* (a.k.a. peremptory) norms. See, e.g., Chibundu, *supra* note 17, at 1131-33; Garland A. Kelley, *Does Customary International Law Supersede A Federal Statute?*, 37 COLUM. J. TRANSNAT’L L. 507, 517 (1999); Stephanie L. Williams, *Your Honor, I Am Here Today Requesting The Court’s Permission to Torture Mr. Doe”: The Legality of Torture as a Means to an End v. The Illegality of Torture as a Violation of Jus Cogens Norms Under Customary International Law*, 12 U. MIAMI INT’L & COMP. L. REV. 301, 324 (2004); Randall, *supra* note 10, at 829-831. However, this merely seems to be overstating the requirement that such crimes be of an international character, as does characterizing the perpetrator of such crimes as being *hostis humani generis* (i.e. an enemy to all of mankind). *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); *In re Extradition of Demjanjuk*, 612 F. Supp. at 556; Randall, *supra* note 10, at 832, 834. Nor does stating that the obligation to prosecute international criminals is *erga omnes* (i.e. “flowing to all”) seem particularly helpful. *Id.* at 829-31. But see

of serious concern to the international community as a whole.⁷⁹⁹ Although piracy⁸⁰⁰ and the slave trade,⁸⁰¹ may be the traditional exemplars,⁸⁰² modern lists⁸⁰³ of such universal crimes would also include war crimes,⁸⁰⁴ genocide,⁸⁰⁵ torture,⁸⁰⁶ attacks on, sabotage of or hijacking aircraft,⁸⁰⁷ and perhaps even apartheid,⁸⁰⁸ terrorism,⁸⁰⁹ and other human rights violations.⁸¹⁰ The assertion of

Id. at 841 (“Universal crimes, obligations *erga omnes*, and peremptory norms [a.k.a. *jus cogens*] may be viewed as doctrinal siblings, sharing the common lineage of a modern world legal order concerned with global peace and human dignity.”).

⁷⁹⁹ DUNOFF, RATNER & WIPPMAN, *infra* note 181, at 353. *See also* Chibundu, *supra* note 17, at 1132.

⁸⁰⁰ *In re* Extradition of Demjanjuk, 612 F. Supp. at 556. However, the current definition of piracy “Requir[es] that piratical acts be committed for private ends, [under] both the 1958 Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea.” Randall, *supra* note 10, at 797-98. Thus, a crime committed on the high seas for other than private ends, such as the *Achille Lauro* hijacking where “the hijackers’ immediate objective was the release of certain Palestinian terrorists imprisoned in Israel,” would not fall within the modern definition of piracy, and thus would not be subject to universal jurisdiction unless the hijackers committed another universal crime. *Id.* This assumes, of course, that the modern treaty-based definition of piracy has supplanted the earlier and arguably broader customary international law definition. *Cf.* John Cerone, American Society of International Law, 100th Annual Meeting, Wash., DC [hereinafter ASIL 100th Mtg.], “The Status of the Individual in International Law,” Mar. 31, 2006 (arguing that although piracy was recognized as an international crime subject to universal jurisdiction, it was always criminalized by domestic statutes). *See infra* notes 408-11 (discussing the “universal jurisdiction plus” concept).

⁸⁰¹ DUNOFF, RATNER & WIPPMAN *infra* note 181, at 353.

⁸⁰² *Dem. Rep. Congo v. Belg.*, 2002 I.C.J. 121. *See also* Randall, *supra* note 10, at 788.

⁸⁰³ *See, e.g.*, Randall, *supra* note 10, at 839; Sriram, *supra* note 17, at 305.

⁸⁰⁴ DINSTEIN, *supra* note 2, at 236: “When charges are preferred against a war criminal, the overriding consideration in the matter of jurisdiction is that the crimes at issue are defined by international law itself. The governing principle is then universality: all States are empowered to try and punish war criminals.” *Id.*

⁸⁰⁵ Randall, *supra* note 10, at 834-37. The Genocide and Apartheid treaties are the only two that declare violations to be international crimes *per se*, versus calling for States to criminalize the behavior domestically. *ILC 1996 Draft Code*, *supra* note 5, at Commentary para. 4 to Art. 8. Yet the Genocide and Torture Conventions did not foresee international prosecutions, calling instead for domestic prosecution or extradition. Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005).

⁸⁰⁶ Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on The Customary Law of Human Rights*, 25 GA. J. INT’L & COMP. L. 99, 120 (1995). Randall, *supra* note 10, at 819.

⁸⁰⁷ Randall, *supra* note 10, at 818, 826.

⁸⁰⁸ *In re* Extradition of Demjanjuk, 612 F. Supp. at 556; Chibundu, *supra* note 17, at 1132; Randall, *supra* note 10, at 819.

⁸⁰⁹ David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005). *Compare* Peter Raven-Hansen, National Security Law lecture at the George Washington University School of Law (Feb. 22, 2006) (universal jurisdiction depends on a universal definition of what is prohibited, and no such universal definition of terrorism exists) *with* Randall, *supra* note 10, at 795, 796-7, 815 (a lack of a common definition of “piracy” in the early 20th century did not stop it from being considered a universal crime subject to universal jurisdiction).

universal jurisdiction for many of these international crimes is based upon multilateral treaties that provide for “domestic jurisdiction over extraterritorial offenses regardless of the actors’ nationalities,” and thus implicitly allow for universal jurisdiction, despite the fact that they lack “any reference to the universality principle.”⁸¹¹

This article will focus on universal jurisdiction as it is applied to war crimes under the Law of War⁸¹² (a.k.a. *jus in bello*),⁸¹³ versus peacetime atrocities.⁸¹⁴ First, it will offer a brief history of the application of universal jurisdiction over war crimes,⁸¹⁵ beginning with the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo, and then considering the two current *ad hoc* international tribunals for Yugoslavia and Rwanda. Next the article will provide a summary of the current status of universal jurisdiction over war crimes, which will necessarily include the ICC’s

⁸¹⁰ Randall, *supra* note 10, at 789, 815, 837-39.

⁸¹¹ *Id.* at 819-20. Ironically, although these multilateral treaties (e.g. war crimes, hijacking, terrorism, and torture conventions) do not mention universal jurisdiction, their requirement to “prosecute or extradite” alleged offenders in their custody essentially transforms universal jurisdiction from a *permissive* basis of jurisdiction to a *mandatory* one for State parties. *Id.* at 820-21. However, nonparty States may be able to claim the “*jurisdictional right*” to prosecute or extradite under these multilateral treaties without being under a “*jurisdictional obligation*” to do so. *Id.* at 824, 826-27, 829-34, 837.

⁸¹² This article will occasionally reference the (as of yet) undefined crime of aggression, which is technically a matter of when States resort to the use of force, or *jus ad bellum*. Although the way in which governments decide to go to war (*jus ad bellum*) influences how the war is waged (*jus in bello*). Sir Franklin Berman, The George Wash. Univ. Law Sch. Symposium: Lawyers and Wars: A Symposium in Honor of Edward R. Cummings [hereinafter Cummings Symposium], Sep. 30, 2005. Moreover, the distinction between *jus ad bellum* and *jus in bello* may be dissolving. ASIL 100th Mtg., *supra* note 27, “The Relationship Between *Jus Ad Bellum* and *Jus In Bello*: Past, Present, Future,” Mar. 30, 2006.

⁸¹³ Of course, “War crimes are not the only crimes against international law that can be committed in wartime. The war itself (if it is waged contrary to the *jus ad bellum*) may constitute a crime against peace, a.k.a. crime of aggression. In addition, acts committed in the course of the war may amount to crimes against humanity or to genocide. However these crimes – which can also be committed in peacetime – transcend the compass of LOIAC [Law of International Armed Conflict].” DINSTEIN, *supra* note 2, at 233. *See also*, Randall, *supra* note 10, at 834-35.

⁸¹⁴ Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT’L L. 361, 371 (1999).

⁸¹⁵ “The approaches to the doctrines of sovereign immunity and universal jurisdiction, and the issue of superior orders all derived from Nuremberg.” Henry T. King, Jr., Remarks at 5, Georgetown Univ. Law Ctr. Symposium: Nuremberg and the Birth of International Law: A Day to Commemorate the 60th Anniversary of the Trials at Nuremberg [hereinafter 60th Nuremberg Anniversary], Nov. 11, 2005.

jurisdiction⁸¹⁶ over State parties to the Rome Statute, but also universal jurisdiction as a matter of customary international law. Finally, the article will offer a few brief conclusions regarding universal jurisdiction over war crimes.

9.2 HISTORY OF UNIVERSAL JURISDICTION OVER WAR CRIMES

The Law of War can be traced back to ancient times. The Sumerians, Hammurabi King of Babylon, Cyrus I King of the Persians, and the Hittites all formulated rules or codes that were designed to regulate and provide structure to armed conflict. The idea that war should adhere to rules evolved throughout the subsequent centuries.⁸¹⁷

Despite the fact that the *Law of War* has an ancient lineage, Professor Dinstein cites no authority for his assertion that *war crimes* have been subject to prosecution *by other States* under international law “[s]ince time immemorial.”⁸¹⁸ However, it is possible to find a few historical examples of (at least *attempted*) universal jurisdiction, broken down into the periods of Antiquity, World War I Era, and Post-World War II. More recently, various States have enacted domestic legislation providing for universal jurisdiction over war crimes, and international tribunals have been given universal jurisdiction over war crimes. Each of these time periods or topics will be considered in turn.

A. Antiquity

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of

⁸¹⁶ This article will not discuss the other crimes currently within the ICC’s jurisdiction, namely genocide, or crimes against humanity, both of which may be “prosecuted even if they are committed outside an armed conflict.” ROBERTS & GUELFF, *supra* note 5, at 668.

⁸¹⁷ Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 177 (2000).

⁸¹⁸ DINSTEIN, *supra* note 2, at 228.

international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits – sacrifice.⁸¹⁹

Even before the medieval ages, there were “certain acts committed during war, including the deliberate murder of civilians” and perfidy that were widely regarded as morally wrongful, and as an affront to the professional character of an honorable soldier.⁸²⁰ “The medieval code of chivalry... further developed this martial code”⁸²¹ of the law of arms or “*jus armorum*.”⁸²²

Violations of the medieval law of chivalry (a.k.a. “law of arms”)⁸²³ were punishable by having one’s knighthood stripped.⁸²⁴ Moreover, a knight who violated the laws of honor could be tried and punished by any court of honor.⁸²⁵ Arguably⁸²⁶ the first ‘international war crimes’ trial was in 1474 of Peter von

⁸¹⁹ Statement of General Douglas MacArthur in Confirming the Death Sentence Imposed by a United States Military Commission on Japanese General Tomayuki Yamashita for Command Responsibility in the Murder of U.S. POWs (October 1946), quoted in William Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, 36 ARIZ. ST. L.J. 1243, 1276 n.185 (2004).

⁸²⁰ Bradford, *supra* note 46, at 1275. See also Theodor Meron, *Crimes And Accountability In Shakespeare*, 92 AM. J. INT’L L. 1, 6 (Jan. 1988). See generally MAURICE H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* (1965).

⁸²¹ Bradford, *supra* note 46, at 1275. Cf. Judge Theodor Meron, Cummings Symposium, *supra* note 39, Sep. 30, 2005 (noting that chivalry was the basis for international humanitarian law, and that honor and shame played a vital role).

⁸²² Theodor Meron, *Shakespeare’s Henry The Fifth and The Law of War*, 86 AM. J. INT’L L. 1, 3 (Jan. 1992).

⁸²³ Major Gerard J. Boyle, USMC, “Humanity In Warfare: The Law Of Civil War,” 2 Apr. 1984, War Since 1945 Seminar, Marine Corps Command & Staff Coll., Marine Corps Dev. & Educ. Command, Quantico, Va. [hereinafter *Humanity in Warfare*], available at <http://www.globalsecurity.org/military/library/report/1984/BGJ.htm> (last visited Mar. 7, 2006).

⁸²⁴ Bradford, *supra* note 46, at 1275.

⁸²⁵ Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Jan. 10, 2006). *Contra* Noone, *supra* note 44, at 181 (“These courts judged the accused knight on their manner with which they treated fellow knights, and not on any number of other ‘lowly’ combatants.”). Cf. *id.* at 185-86; Judge Theodor Meron, Cummings Symposium, *supra* note 39, Sep. 30, 2005 (noting that chivalry had a very narrow scope in that it only protected: (1) knights, not peasants; (2) *Christian* knights; and (3) rape of *Christian* women). Accord Meron, *supra* note 49, at 3; Chris af Jochnick and Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49, 61 (1994). Of course, despite the limited protections of chivalry, it still was an early example of universal jurisdiction enforced by States that might bear no relation to the crime.

⁸²⁶ Some commentators would put the first recorded international war crimes trial as *circa* 1376, for the war crimes committed by the Duke of Lorraine during the invasion of Alsace. Dinah L. Shelton, International

Hagenbach for his violations of the law of war. Von Hagenbach was made governor of the city of Breisach by Charles the Bold, Duke of Burgundy, and he subsequently proceeded to rape, murder, confiscate private property, and illegally tax . . . its citizens. The court . . . [rejected] Von Hagenbach[’s] . . . ‘superior orders’ defense . . . and he was convicted. He was condemned to death, but first “deprived of his knighthood” and then executed.⁸²⁷

“By the Renaissance a set of norms, internalized by a transnational professional caste requiring, *inter alia*, minimization of civilian casualties consistent with military objectives as a matter of honor, had perfused warfare.”⁸²⁸ This martial code was based on the “conception of the foe as a fellow professional,” and thus “directed the honorable soldier to renounce treachery and criminality in combating him.”⁸²⁹ These martial norms were passed along via a “collective narrative developed to inform soldiers in the discharge of their duties; when in doubt, soldiers conformed to ‘stories about the great deeds of honorable soldiers’ drawn from the ‘collective narrative of [their] corps.’”⁸³⁰ This transnational martial code shared by the professional caste of soldiers was the primogenitor for twentieth century conceptions of universal jurisdiction over war crimes.

By the end of the Renaissance in the sixteenth century, the concept of universal jurisdiction over piracy was also starting to take hold.⁸³¹ Shortly after the end of the Renaissance, the watershed Treaty of Westphalia,⁸³² which ended the Thirty

Law-Human Rights lecture at the George Washington University School of Law (Sep. 21, 2005 & Nov. 15, 2005). Obviously neither of these would be the first recorded episodes of war crimes *having been committed*. For example, despite immunity of envoys as a principle of international law going back to the Romans, the Vatican’s execution of Ghenghis Khan’s envoy prompted his worst abuses. *Id.* (Nov. 17, 2005).

⁸²⁷ Noone, *supra* note 44, at 181-82 & n.25.

⁸²⁸ Bradford, *supra* note 46, at 1275.

⁸²⁹ *Id.* at 1276.

⁸³⁰ *Id.*

⁸³¹ Randall, *supra* note 10, at 791-95, 839.

⁸³² Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, signed Oct. 24, 1648, *reprinted in* 1 MAJOR PEACE TREATIES OF MODERN HISTORY 7 (F. L. Israel ed., 1967), available at <http://www.yale.edu/lawweb/avalon/westphal.htm> (last visited Mar. 7, 2006).

Years War in 1648, marked the formation of a community of sovereign States, and hence the foundations of modern public international law.⁸³³ Hugo Grotius “considered the father of international law, had published his *Law of War and Peace [De Jure Belli Ac Pacis Libi Tres]*”⁸³⁴ in 1625 during the Thirty Years War, in response to the atrocities he witnessed.⁸³⁵ Grotius put forth general principles for the law of war (and hence war crimes, as violations of the law of war),⁸³⁶ that were gradually accepted as customary international law.⁸³⁷ Grotius addressed the concept of universal jurisdiction as follows:

The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever. . . . Truly it is more honourable to avenge the wrongs of others rather than one's own.⁸³⁸

During the middle of the nineteenth century, the principles developed by Grotius were incorporated into various military manuals.⁸³⁹ By the nineteenth century, universal jurisdiction over slave trading⁸⁴⁰ was also recognized. This ended what

⁸³³ William C. Bradford, *International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A Cursory Quantitative Assessment of the Associative Relationship*, 16 AM. U. INT'L L. REV. 647, 652 n.12 (2001).

⁸³⁴ Major Gerard J. Boyle, USMC, *Humanity In Warfare*, *supra* note 50.

⁸³⁵ Noone, *supra* note 44, at 187-88.

⁸³⁶ H. GROTIUS, *RIGHTS OF WAR AND PEACE*, 361-67 (A. Campbell trans. 1901).

⁸³⁷ Major Gerard J. Boyle, USMC, *Humanity In Warfare*, *supra* note 50.

⁸³⁸ Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suarez*, 85 AM. J. INT'L L. 110, 112 (1991).

⁸³⁹ Major Gerard J. Boyle, USMC, *Humanity In Warfare*, *supra* note 50.

⁸⁴⁰ Randall, *supra* note 10, at 796-800.

Professor Randall has coined the first of “three evolutionary stages” of universal jurisdiction.⁸⁴¹

B. World War I Era

Although “no *specific* precedent existed prior to the Second World War for subjecting war crimes and crimes against humanity to the universality principle,”⁸⁴² there had been repeated attempts to establish a competent tribunal of universal jurisdiction extending back to the nineteenth century. In 1872, the “President of what was to be later called the ICRC [International Committee of the Red Cross], proposed the establishment of an international criminal court to adjudicate violations of the 1864 Geneva Convention.”⁸⁴³ “At the ‘First Peace Conference’ in the Hague in 1899, [the] founder and President of the American Society of International Law . . . was a strong advocate for international tribunals.”⁸⁴⁴

Even as late as the first third of the twentieth century, before the commencement of World War II, there had been repeated attempts at establishing a competent tribunal of universal jurisdiction. In 1915, Great Britain, France and Russia denounced Turkey’s massacre of its Armenian minority population as “crimes against humanity,”⁸⁴⁵ leading to President Woodrow Wilson’s proposal “to maintain peace via a League of Nations.”⁸⁴⁶ Because Turkey submitted to Allied demands and prosecuted two Turkish officials for the Armenian massacre,⁸⁴⁷ calls for an international court were stillborn.⁸⁴⁸

⁸⁴¹ *Id.* at 839.

⁸⁴² *Id.* at 803 (emphasis added).

⁸⁴³ ROBERTS & GUELFF, *supra* note 5, at 667.

⁸⁴⁴ Benjamin B. Ferencz, *Misguided Fears About The International Criminal Court*, 15 PACE INT’L L. REV. 223, 241 (2003).

⁸⁴⁵ *Id.* at 241-42. *See also* Noone, *supra* note 44, at 201.

⁸⁴⁶ Ferencz, *supra* note 71, at 241-42.

⁸⁴⁷ Both Turkish officials were convicted, and one was sent to the gallows. Noone, *supra* note 44, at 201.

Legal experts appointed by the League [also] concluded that an international criminal court should be created to hold accountable those responsible for Germany's aggressions and atrocities [during World War I].⁸⁴⁹ In “1920, the Allied Powers presented a list of 854 individuals for [international] trial to the new German government . . . [but t]he German government . . . made a counterproposal ‘that those accused of war crimes be tried before the German Supreme Court in Leipzig’ [to which t]he Allied Powers ultimately agreed.”⁸⁵⁰ Thus, calls for an international war crimes tribunal over alleged Turkish and German war criminals after World War I nevertheless gave precedence to national courts, foreshadowing the complementarity principle of the International Criminal Court (ICC).⁸⁵¹

As Professor Ferencz so succinctly summarized: “World War I inspired efforts to put the [German] Kaiser on trial for aggression and to hold German officers accountable for their atrocities. The efforts failed.”⁸⁵² The Kaiser was not indicted for specific war crimes committing during World War I, but for general violations of the law of nations, and dictates of the public conscience, which was a direct reference back to the Martens⁸⁵³ clause in the 1907 Hague Regulations.⁸⁵⁴

⁸⁴⁸ The two Turkish officials who were convicted were the only two held accountable for the Armenian massacre, and the other alleged perpetrators were granted amnesty in the 1923 Treaty of Lausanne. Noone, *supra* note 44, at 201.

⁸⁴⁹ Ferencz, *supra* note 71, at 242.

⁸⁵⁰ Noone, *supra* note 44, at 200.

⁸⁵¹ *See infra* Parts II.E.4 and III.D.

⁸⁵² Ferencz, *supra* note 71, at 243.

⁸⁵³ Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter 1907 Hague Convention IV]:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Id. at preamble para. 8.

⁸⁵⁴ Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Sep. 21 & Nov. 15, 2005).

However, in perhaps another foreshadowing of the ICC (this time of the United States' objections thereto), "[i]n 1919, in Paris, it was the American delegates at the War Guilt Investigation Committee who opposed most strongly any legal sentence on the Kaiser for the very reason of the incompatibility of such a procedure with the sovereignty of the State."⁸⁵⁵ Ultimately, the indictment of the Kaiser for war crimes committed during World War I failed, not because of any lack of support for an international tribunal to resolve the case, but because the Netherlands (to which the Kaiser escaped after the war) refused to extradite him.⁸⁵⁶ The Kaiser's indictment for war crimes laid the groundwork for the Nuremberg trials after World War II, and yet the failure of the Kaiser's indictment also foreshadowed the Article 98 agreements that the United States has championed in an attempt to thwart the potential jurisdiction of the ICC over American nationals.⁸⁵⁷

Subsequent attempts after World War I to establish a permanent international criminal court also failed.

A French proposal to the League of Nations in 1934 for the creation of a permanent international criminal court was aimed at punishing acts of political terrorism [e.g. assassinations] rather than war crimes and, in [any] event, the two treaties defining the crimes and establishing the court adopted at a diplomatic conference in 1937 never entered into force.⁸⁵⁸

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"The United States, catering to strong isolationist sentiments, remained aloof."⁸⁵⁹ Unfortunately, America's isolationism after World War I led to the rise of Adolf

⁸⁵⁵ International Military Tribunal, Nuremberg Trial Proceedings Volume 17, One Hundred And Seventy-First Day, Thursday, 4 July 1946, Morning Session, Professor Dr. Hermann Jahrreiss (Counsel for Defendant Jodl), available at <http://www.yale.edu/lawweb/avalon/imt/imt.htm> (last visited Apr. 10, 2006). See also Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005).

⁸⁵⁶ Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Sep. 21 & Nov. 15, 2005).

⁸⁵⁷ See *infra* Part II.E.4.

⁸⁵⁸ ROBERTS & GUELFF, *supra* note 5, at 667. See also Ferencz, *supra* note 71, at 242.

⁸⁵⁹ Ferencz, *supra* note 71, at 242.

Hitler in a disgruntled Germany.⁸⁶⁰ “The failure to hold high-ranking criminals accountable [after World War I] was recalled years later by Adolf Hitler, who commented contemptuously when launching the Holocaust: ‘Who remembers the Armenians?’”⁸⁶¹

C. Post-World War II

After World War II, Winston Churchill and Joseph Stalin recommended summarily executing the Nazi leaders as war criminals.⁸⁶² “But [U.S. Supreme Court Justice] Robert Jackson and U.S. Secretary of War Henry L. Stimson felt there was a better way – a legal way – to deal with the Nazi leaders for their crimes. They wanted fairness rather than vengeance to be the order of the day.”⁸⁶³ Besides the initial war crimes tribunals in Nuremberg and Tokyo, subsequent trials were conducted years later as fugitive Nazi leaders were found and brought to justice. Jurisdiction in each of these trials was premised, at least in part, on universal jurisdiction.⁸⁶⁴

1. Nuremberg

Justice Jackson was granted leave from the Supreme Court to serve as the lead U.S. prosecutor at the International Military Tribunal (IMT) in Nuremberg,⁸⁶⁵

⁸⁶⁰ Father Robert F. Drinan, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.

⁸⁶¹ Ferencz, *supra* note 71, at 242. Ferencz offers no source for this attribution, but it is commonly attributed to Hitler. The Committee for Open Debate on the Holocaust Web page contains a discussion of the alleged statement, describes circumstances surrounding it, and offers evidence that it may not have actually been made. <http://forum.codoh.com/viewtopic.php?p=3709>

⁸⁶² Sean D. Murphy, The George Wash. Univ. Law Sch.: “Should the U.S. Join the International Criminal Court?” A Moderated Panel Discussion [hereinafter ICC Panel], Feb. 13, 2006; Henry T. King, Jr., Remarks at 5, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005; ABA President-Elect Karen Mathis, *Id. Cf. In re* Extradition of Demjanjuk, 612 F. Supp. at 558 (noting that “It is a historical verity that the victors in war have meted out punishment to the vanquished in the name of justice.”).

⁸⁶³ Henry T. King, Jr., Remarks at 5, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.

⁸⁶⁴ Randall, *supra* note 10, at 800. *See also* Demjanjuk v. Petrovsky, 776 F.2d at 582.

⁸⁶⁵ Ferencz, *supra* note 71, at 225.

which was administered jointly by the four Allied powers.⁸⁶⁶ The IMT was responsible for prosecuting the major German war criminals,⁸⁶⁷ which included the “German leaders responsible for planning or perpetrating the aggressions, crimes against humanity and war crimes committed in flagrant violation of existing international laws.”⁸⁶⁸ Justice Jackson was careful to put together overwhelming proof of the alleged war criminals’ guilt, realizing that this was an historic endeavor: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.”⁸⁶⁹

Historically, the IMT is generally viewed as the commendable exercise of universal jurisdiction⁸⁷⁰ over Nazi war criminals,⁸⁷¹ and that “[a]t Nuremberg, the rule of law took a step forward.”⁸⁷² “Hitler and his henchmen had been warned in 1942 that they would be held accountable for the atrocities being committed by Nazi Germany,”⁸⁷³ and so they were. All but three of the Nazi defendants were convicted after receiving putatively fair trials; seventy-one were hung, but many were imprisoned, and eventually released after having been pardoned.⁸⁷⁴

⁸⁶⁶ United States, Great Britain, France, and Russia. Besides the four Allied powers, “[n]ineteen other states assented to the London Agreement” which established the IMT.” Randall, *supra* note 10, at 801.

⁸⁶⁷ *Id.*

⁸⁶⁸ Ferencz, *supra* note 71, at 225.

⁸⁶⁹ *Id.* at 225-26

⁸⁷⁰ *Demjanjuk v. Petrovsky*, 776 F.2d at 582. *Cf.* Randall, *supra* note 10, at 800, 805-06 (noting that the Allies could also have based jurisdiction on the territoriality, nationality, and passive personality principles, and that “while many sources view the IMT’s proceedings as being partly based on the universality principle, the IMT’s judgment and records actually evidence little or no explicit reliance on universal jurisdiction”). However, the perception that the IMT exercised universal jurisdiction grew out of its attempts to define crimes of universal condemnation, for which the international community could not rely on domestic courts to resolve.

⁸⁷¹ *See* Randall, *supra* note 10, at 803-04 (comparing the Axis offenses to piracy in order to justify the application of universal jurisdiction over the former). *Cf. id.* at 804 (recognizing that “the Allies’ partial reliance on the universality principle . . . represents a marked expansion of universal jurisdiction”).

⁸⁷² Ferencz, *supra* note 71, at 226.

⁸⁷³ Ferencz, *supra* note 71, at 225.

⁸⁷⁴ Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; ABA President-Elect Karen Mathis, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.

“Nuremberg was designed to replace the ‘law of force’ with the ‘force of law,’”⁸⁷⁵ which it accomplished merely by providing judicial process instead of turning the “final solution” back against the Nazi leaders themselves, as the British and Russians proposed. Even the German people eventually came to regard the IMT prosecutions as a just result for the holocaust, although this took decades to come about.⁸⁷⁶

Yet the IMT is today (and was then) not without its critics. Professor Wedgwood has pointed out that only the leaders and members of the Axis powers were prosecuted, and that neither the United States nor the other Allies were ever held accountable for potential war crimes, such as the firebombing of Dresden.⁸⁷⁷ Despite Justice Jackson’s role as chief U.S. prosecutor, the remainder of the justices on the U.S. Supreme Court considered the IMT to be “victors’ justice.”⁸⁷⁸ In fact, Chief Justice Harlan Stone called the IMT, “Jackson’s high lynching expedition.”⁸⁷⁹ In addition, Justice “Jackson did not have support of much of the organized bar of the United States and Nuremberg [and] was excoriated by Senator Robert A. Taft But Jackson withstood the slings and arrows of his countrymen and held fast to his belief in the legitimacy of Nuremberg.”⁸⁸⁰

The IMT “was a long time coming. But it was only a beginning.”⁸⁸¹ After the IMT (generally known as “The Nuremberg Court”)⁸⁸² tried the major Nazi officials, the Allies created “courts within the four occupation zones of post-war Germany which tried lesser Nazis,”⁸⁸³ again basing jurisdiction on universality.⁸⁸⁴ The

⁸⁷⁵ Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.

⁸⁷⁶ Michael Scharf, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005. Professor Scharf predicted that it may take equally long for the ICTR and ICTY to change people’s minds. *Id.*

⁸⁷⁷ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

⁸⁷⁸ Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

⁸⁷⁹ Henry T. King, Jr., Remarks at 7, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.

⁸⁸⁰ *Id.*

⁸⁸¹ Ferencz, *supra* note 71, at 225.

⁸⁸² Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.

⁸⁸³ *Demjanjuk v. Petrovsky*, 776 F.2d at 582; Randall, *supra* note 10, at 801.

United States conducted its twelve subsequent trials of lesser Nazis in the same court in Nuremberg that had housed the IMT.⁸⁸⁵ The International Military Tribunal for the Far East (IMTFE) conducted similar trials of Japanese war criminals in Tokyo,⁸⁸⁶ ultimately convicting twenty-eight of them for war crimes committed against Allied troops, and for offenses committed in various Japanese-occupied territories.⁸⁸⁷

2. Eichmann

Years after the end of World War II, related war crimes trials were still being conducted under the rubric of universal jurisdiction as alleged war criminals were discovered hiding, often under assumed names, in foreign countries.⁸⁸⁸ The first prominent example of such a belated war crimes trial was Israel's prosecution of Adolph Eichmann⁸⁸⁹ in 1961, after having abducted him from Argentina.⁸⁹⁰ The Israeli government sent a *note verbale* to the Argentine Government, expressing its "hope that Argentina would overlook this violation of its sovereignty given 'the special significance' of bringing to trial the man responsible for the murder of

⁸⁸⁴ Randall, *supra* note 10, at 806-10 ("The proceedings of the zonal tribunals...contain more explicit references to the universality principle").

⁸⁸⁵ Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005; Ferencz, *supra* note 71, at 225.

⁸⁸⁶ Ferencz, *supra* note 71, at 243; DINSTEIN, *supra* note 2, at 10; Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

⁸⁸⁷ Randall, *supra* note 10, at 802.

⁸⁸⁸ *Id.* For example, Adolph Eichmann was discovered in "Buenos Aires living under the alias of Ricardo Klement." Biography of Simon Wiesenthal, available at <http://www.jewishvirtuallibrary.org/jsource/biography/Wiesenthal.html> (last visited Apr. 10, 2006).

⁸⁸⁹ Adolph Eichmann was the SS Lieutenant Colonel in charge of the Nazi Gestapo Jewish Section," and thus responsible for supervising the "final solution of the Jewish Question." Randall, *supra* note 10, at 810. See also Biography of Adolf Eichmann, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/eichmann.html> (portraying Eichmann as more of a bureaucrat than an anti-Semitic ideologue; last visited Apr. 10, 2006); Doron Geller, *The Capture of Adolf Eichmann*, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/eichcap.html> ("at all the Nuremberg trials of Nazi war criminals [Eichmann] was pointed to as the head butcher"; last visited Apr. 10, 2006).

⁸⁹⁰ Randall, *supra* note 10, at 802, 810 (1988). See also Biography of Adolf Eichmann, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/eichmann.html> (last visited Apr. 10, 2006).

millions of Jewish people.”⁸⁹¹ Although obviously “the universality principle did not permit Israel to transgress Argentina's sovereignty,” and thus “[r]eturning Eichmann to Argentina might have been the proper remedy for the illegal abduction,” which Argentina initially demanded.⁸⁹² Nevertheless, “Argentina eventually waived its right to protest Israel's jurisdiction over Eichmann,”⁸⁹³ thus paving the way for Israel to bring Eichmann to justice. “Israel based its jurisdiction under international law on the passive personality, protective, and universality principles.”⁸⁹⁴

However, Eichmann's trial was not without its own hurdles. The first hurdle was Eichmann's claim that his irregular rendition from Argentina violated his rights and deprived the Jerusalem court of jurisdiction. Yet “under Israeli law, the ‘irregularities’ of Eichmann's apprehension did not entitle him to challenge the court's jurisdiction,” which is consistent with U.S. law as well.⁸⁹⁵

The second hurdle at trial was the fact that the State of Israel did not exist when Eichmann committed his crimes during World War II.⁸⁹⁶ “Because Eichmann's victims were not Israelis when Eichmann acted and because Eichmann never threatened Israel's security, Israel's reliance on the passive personality and protective principles expanded those jurisdictional bases [considerably].”⁸⁹⁷ However,

the fact that Israel was not a state when Eichmann acted does not affect the legitimacy of Israel's jurisdiction under the universality principle. The basic premise of universal jurisdiction holds that every state has an

⁸⁹¹ Randall, *supra* note 10, at 812 & n. 171.

⁸⁹² *Id.* at 813 & n. 174.

⁸⁹³ *Id.* at 813 & n. 175.

⁸⁹⁴ *Id.* at 811, 814.

⁸⁹⁵ *Id.* at 813 & n. 176 (1988). *See also* Frisbie v. Collins, 342 U.S. 519 (domestic interstate seizure), *reh'g denied*, 343 U.S. 937 (1952); Ker v. Illinois, 119 U.S. 436 (1886) (international seizure).

⁸⁹⁶ Randall, *supra* note 10, at 814 & n. 177 (noting that the State of Israel was not proclaimed until May 14, 1948).

⁸⁹⁷ *Id.* at 814 & n. 178.

interest in bringing to justice the perpetrators of particular crimes of international concern. Logically, that sovereign interest is not limited to states that existed when the international crimes occurred... When *any* state captures and punishes a universal offender, all states benefit. In light of the universality principle's purpose of redressing a special category of offenses, Israel's universal jurisdiction was valid despite Israel's lack of existence when Eichmann acted.⁸⁹⁸

Israel's claim to universal jurisdiction was also bolstered by the enactment of "several significant multilateral treaties, including the [four] Geneva Conventions of 1949 and the [Genocide] Convention... [which] confirmed the global condemnation of crimes such as Eichmann's, thus lending additional authority to Israel's use of universal jurisdiction."⁸⁹⁹ Thus, Israel's jurisdiction over Eichmann was more firmly based on universal jurisdiction than the earlier Nuremberg trials.⁹⁰⁰

The third hurdle at Eichmann's trial was more of a matter of comity between States than jurisdiction: the possibility of extradition back to Germany to stand trial.

The usual limitation is that the state which has apprehended the offender must first offer his extradition to the state in which the offense was committed. This limitation has no place in the circumstances of this case. This limitation was a practical one, based on availability of witnesses and evidence and therefore it becomes the *forum conveniens* for the conduct of the trial. Here the great number of witnesses and documentary evidence is in Israel.⁹⁰¹

⁸⁹⁸ *Id.* at 814.

⁸⁹⁹ Randall, *supra* note 10, at 814-21.

⁹⁰⁰ See *supra* Part II.C.1. But see *In re Extradition of Demjanjuk*, 612 F. Supp. at 556-57.

⁹⁰¹ Attorney-General of Israel v. Eichmann, 36 I.L.R. 277 (Isr. Sup. Ct. 1962). See also DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 353-56, 368-70 (providing excerpts of the Israeli Supreme Court's decision in the *Eichmann* case).

Thus, the Israeli courts were not obligated to extradite Eichmann to Germany.⁹⁰² After a thirteen-day trial, “[t]he District Court of Jerusalem convicted Eichmann and [subsequently] sentenced him to death, and the Supreme Court of Israel affirmed.”⁹⁰³ Eichmann’s conviction and execution put one more nail into the coffin of World War II atrocities, but it was not to be the final nail.

3. Demjanjuk

The second prominent (and more recent) example of a war crimes trial held decades after the end of World War II is the trial of John (Ivan) Demjanjuk (a.k.a. “Ivan the Terrible of Treblinka”), also held in Israel.⁹⁰⁴ Demjanjuk was a Ukrainian who was conscripted into the Soviet Red Army in 1940. He was captured by the Germans in 1942 and volunteered for service in the SS [*Schutzstaffel*].⁹⁰⁵ Demjanjuk allegedly served as an SS guard at various concentration/extermination camps, where he operated the gas chambers, “euthanizing” untold numbers of Jews.⁹⁰⁶ After World War II, Demjanjuk departed

⁹⁰² This is consistent with the general principle of “prosecute *or* extradite” that is found in most multilateral conventions. Prosecution and extradition are viewed as alternatives, not as steps to be followed *seriatim*, with extradition necessarily being of primary importance or consideration. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

⁹⁰³ Randall, *supra* note 10, at 811; Attorney General of Israel v. Eichmann, 36 I.L.R. 18 (Isr. Dist. Ct. - Jerusalem 1961), *aff’d*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962). An unofficial translation of the district court opinion prepared by the Israeli Government is available at 56 AM. J. INT’L L. 805 (1962). The supreme court opinion is available at 45 PESAKIM MEHOZIIM 3, *published in part in* 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1657 (L. Friedman ed. 1972).

⁹⁰⁴ Randall, *supra* note 10, at 802.

⁹⁰⁵ *The Demjanjuk Case: Factual and Legal Details*, July 28, 1993, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk2.html> (last visited Apr. 10, 2006); Demjanjuk v. Petrovsky, 776 F.2d at 575.

⁹⁰⁶ At the Treblinka extermination camp where Demjanjuk allegedly operated the gas chambers, it is estimated that “700,000 Jews were killed [t]here by carbon monoxide” in a seventeen-month period between July 1942 and November 1943. *Killing People Through Gas In Extermination and Concentration Camps*, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/gascamp.html> (last visited Apr. 10, 2006). This was the same time period that Demjanjuk allegedly operated the gas chambers at Treblinka. *In re Extradition of Demjanjuk*, 612 F. Supp. at 551.

Europe, and emigrated to the United States in 1952, where he became a naturalized citizen residing near Cleveland, Ohio.⁹⁰⁷

In 1975, “there came into the possession of certain members of the U.S. Senate a list of Nazi war criminals living... in the U.S.”⁹⁰⁸ Demjanjuk’s name was on the list.⁹⁰⁹ After conducting an international investigation, the Immigration and Naturalization Service (INS) instituted denaturalization proceedings against Demjanjuk in 1977, although his trial was delayed until 1981.⁹¹⁰ In 1983, while Demjanjuk’s appeals were pending, the State of Israel requested his extradition “to stand trial in Israel for murder and other offenses alleged under the Nazis and Nazi Collaborators (Punishment) Law.”⁹¹¹ The federal district court for the Northern District of Ohio found that Demjanjuk “had made material misrepresentations in his visa application by failing to disclose his service for the German SS at the Trawniki and Treblinka prison camps in 1942-43, [and] ... ordered that [Demjanjuk]’s United States citizenship be revoked and his certificate of naturalization cancelled.”⁹¹² The federal district court also certified to the U.S. Secretary of State “that Demjanjuk was subject to extradition [to Israel]... on the charge of murder.”⁹¹³

On appeal, the Sixth Circuit Court of Appeals upheld the district court’s extradition certification, because all of the extradition requirements were met, including the fact that “the State of Israel has jurisdiction to punish for war crimes and crimes against humanity committed outside of its geographic boundaries”

⁹⁰⁷ *In re* Extradition of Demjanjuk, 612 F. Supp. at 546.

⁹⁰⁸ *The Demjanjuk Case: Factual and Legal Details*, July 28, 1993, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk2.html> (last visited Apr. 10, 2006).

⁹⁰⁹ *Id.* “The information listed evidently emanated from material collated in the Soviet Union, consisting of authentic German documents captured by the Red Army when occupying territories under Nazi control in the summer of 1944.” *Id.*

⁹¹⁰ *Id.*

⁹¹¹ *Demjanjuk v. Petrovsky*, 612 F. Supp. at 572.

⁹¹² *In re* Extradition of Demjanjuk, 612 F. Supp. at 546; *United States v. Demjanjuk*, 518 F. Supp. 1362 (N. D. Ohio, 1981), *aff’d*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

⁹¹³ *In re* Extradition of Demjanjuk, 612 F. Supp. at 571.

based on universal jurisdiction, which the U.S. also recognizes.⁹¹⁴ Demjanjuk was finally extradited to Israel in 1986,⁹¹⁵ where he was tried and convicted on all counts after a thirteen-month trial (versus Eichmann's thirteen-day trial), and sentenced to death.⁹¹⁶ "After spending five years on death row, the Israeli Supreme Court ruled [in 1993] there was reasonable doubt that he was Ivan [the Terrible of Treblinka]"⁹¹⁷ and ordered that he be released."⁹¹⁸ The Israeli Supreme Court held that although evidence of other crimes committed by Ivan Demjanjuk had been found, "a change in the basis of the extradition, more than seven years after the proceedings against [Demjanjuk] were opened, would be unreasonable."⁹¹⁹

Demjanjuk returned to the U.S., where his U.S. citizenship was reinstated in 1998, but then stripped again in 2002,⁹²⁰ because although Demjanjuk apparently wasn't "Ivan the Terrible of Treblinka," he had been a guard at other Jewish concentration camps, and thus had still lied on his U.S. naturalization application.⁹²¹ Demjanjuk (now eighty-five years old) recently was ordered deported to his native Ukraine on December 28, 2005.⁹²² Demjanjuk plans to

⁹¹⁴ Demjanjuk v. Petrovsky, 776 F.2d at 583. See also Randall, *supra* note 10, at 790 & n.26.

⁹¹⁵ *The Demjanjuk Case: Factual and Legal Details*, July 28, 1993, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk2.html> (last visited Apr. 10, 2006). 143 *Id.*

⁹¹⁶ *Id.*

⁹¹⁷ Israeli prosecutors had obtained additional evidence from the former Soviet Union (which the Soviet Army had seized after World War II), including a number of written depositions that Ivan the Terrible of Treblinka was named Ivan Marchenko, not Ivan Demjanjuk. Asher Felix Landau, *The Demjanjuk Appeal*, July 29, 1993, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk3.html> (last visited Apr. 10, 2006).

⁹¹⁸ *Demjanjuk Loses U.S. Citizenship*, Feb. 21, 2002, available at, <http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk4.html> (last visited Apr. 10, 2006).

⁹¹⁹ Asher Felix Landau, *The Demjanjuk Appeal*, July 29, 1993, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk3.html> (last visited Apr. 10, 2006).

⁹²⁰ *U.S. Court Rules John Demjanjuk Was Nazi Guard*, Apr. 30, 2004, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk5.html> (last visited Apr. 10, 2006).

⁹²¹ *Demjanjuk Loses U.S. Citizenship*, Feb. 21, 2002, available at, <http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk4.html> (last visited Apr. 10, 2006).

⁹²² *Demjanjuk Ordered Deported*, Dec. 28, 2005, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk6.html> (last visited Apr. 10, 2006).

appeal the immigration judge's order.⁹²³ The conclusion of Demjanjuk's case may very well mark the end to Professor Randall's second of "three evolutionary stages" of "universal jurisdiction over war crimes, crimes against humanity, and other Axis offenses following the Second World War."⁹²⁴

D. Domestic Statutes

The State of Israel based its jurisdiction over Demjanjuk's trial on its domestic "Nazis and Nazi Collaborators (Punishment) Law."⁹²⁵ Although Israel's domestic universal jurisdiction statute is, by definition, limited to Nazi offenders, other States' have enacted domestic statutes that are more broadly defined, taking their cue from international treaties that purport to extend "universal jurisdiction over grave breaches of the Geneva Conventions, hijacking, hostage taking, crimes against internationally protected persons, apartheid, torture, genocide, and possibly other offenses."⁹²⁶ This is what Professor Randall calls the final of "three evolutionary stages" of universal jurisdiction.⁹²⁷

Within this "general revival of the concept of universal jurisdiction,"⁹²⁸ is the specific notion that "any nation has the right to try and prosecute war criminals."⁹²⁹ The four Geneva Conventions of 1949 specifically provide for

⁹²³ *Appeal Possible for Alleged Nazi Guard*, <http://www.msnbc.msn.com/id/10630835/> (last visited Apr. 10, 2006).

⁹²⁴ Randall, *supra* note 10, at 839.

⁹²⁵ *Demjanjuk v. Petrovsky*, 612 F. Supp. at 572.

⁹²⁶ Randall, *supra* note 10, at 839. *Cf.* Bruno Simma & Andreas L. Paulus, 93 AM. J. INT'L L. 302, 214 (Apr. 1999) (noting that while universal jurisdiction for genocide and crimes against humanity seems almost universally accepted, universal jurisdiction for grave breaches of the Geneva Conventions is only "increasingly accepted," and universal jurisdiction over human rights violations, such as torture or forced disappearances, is only provided for "in some instances").

⁹²⁷ Randall, *supra* note 10, at 839.

⁹²⁸ Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Jan. 10, 2006).

⁹²⁹ *Id.*

universal jurisdiction under domestic statutes for “grave breaches” of the Geneva Convention:

The High Contracting Parties undertake to *enact any legislation necessary to provide effective penal sanctions for persons committing... any of the grave breaches* of the present Convention... [and] to search for persons alleged to have committed... such grave breaches, *and shall bring such persons, regardless of their nationality, before its own courts.*

It may also . . . hand such persons over for trial to another High Contracting Party concerned.⁹³⁰ Thus, many States have enacted domestic legislation providing for universal jurisdiction over war crimes, or at least those war crimes that represent “grave breaches”⁹³¹ of the 1949 Geneva Conventions.⁹³² As Professor Dinstein explains, “self-discipline by a belligerent Party is not enough,” and thus military and political leaders should anticipate that if they are unwilling to do so, other States will prosecute their nationals for war crimes, which they have done “since time immemorial.”⁹³³

⁹³⁰ Geneva Convention IV, *supra* note 129, at Art. 146 (emphasis added). *See also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3115, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

⁹³¹ Article 147 of the Fourth Geneva Convention of 1949 contains the following list of “grave breaches”:

wilful killing, torture or inhuman treatment ... wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial ..., taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Geneva Convention IV, *supra* note 129, at Art. 147

⁹³² Nicole Barrett, *Holding Individual Leaders Responsible For Violations Of Customary International Law: The U.S. Bombardment Of Cambodia And Laos*, 32 COLUM. HUM. RTS. L. REV. 429, 469-70 (Spring 2001).

⁹³³ DINSTEIN, *supra* note 2, at 228.

For example, Spain “requested extradition of General Pinochet [former President of Chile] from England to Spain for the murders of Spanish civilians in Chile in violation of the Convention Against Torture to which both England and Spain were signatories.”⁹³⁴ Spain asserted jurisdiction under both universal jurisdiction and the “passive personality” theory,⁹³⁵ because the victims were Spanish. The English House of Lords held that Pinochet could be extradited under universal jurisdiction under the Convention Against Torture.⁹³⁶ However, if each State decides for itself when another head-of-state’s act constitutes an international crime, that could disrupt diplomatic relations – this being one of the main justifications for creating the International Criminal Court (ICC).⁹³⁷

“Belgium enacted a law allowing for [universal] jurisdiction over certain egregious violations of international law committed anywhere in the world, and convicted four Rwandan Hutus of committing genocide in Rwanda.”⁹³⁸ “A later [Belgian] decision held that a suspect had to be physically present in Belgium in order to be investigated and tried,” thereby negating the possibility of *in absentia* trials.⁹³⁹

⁹³⁴ Barrett, *supra* note 159, at 430 n. 6.

⁹³⁵ Sriram, *supra* note 17, at 317; Barrett, *supra* note 159, at 472 & n. 183; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005). *See generally* Sriram, *supra* note 17, at 318-31 & n. 53.

⁹³⁶ Barrett, *supra* note 159, at 430 n. 6. *Contra* Sriram, *supra* note 17, at 323-25, 355-56 & n. 76-81, 225 (stating that universal jurisdiction was not “the central basis for the House of Lords’ willingness to extradite”).

⁹³⁷ Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005). *See infra* Part II.E.4.

⁹³⁸ BRADLEY & GOLDSMITH, *supra* note 10, at 536. *See also* Barrett, *supra* note 159, at 470 & n. 176; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005) (noting that the four Rwandan Hutu defendants had been Belgian residents, and that Belgium had also been the colonial power in Rwanda, thus arguably supporting nationality jurisdiction as well).

⁹³⁹ BRADLEY & GOLDSMITH, *supra* note 10, at 537. *Accord* Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002 (reporting a Belgium court’s ruling that the case against Ariel Sharon could not be brought because he was not in Belgium), *available at* <http://news.bbc.co.uk/1/hi/world/europe/2066808.stm> (last visited Mar. 27, 2006). Requiring physical presence of the defendant before exercising universal jurisdiction could be seen as simply requiring personal (vs. subject matter) jurisdiction, rather than requiring some nexus to the State, such as that required for territorial jurisdiction (i.e. conduct occurring within the State, or having an effect therein). *See also* Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005) (noting that the Belgian law has been changed to now require a link to Belgium, and that individuals can no longer initiate investigations, but only a Belgian prosecutor can). *Cf.* Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002 (noting that “[t]he cases have been an

Belgium also tried to establish universal jurisdiction over the Foreign Minister of the Democratic Republic of the Congo (DRC) for alleged genocide and crimes against humanity; the International Court of Justice (ICJ) dismissed the claim based on the Minister's immunity, rather than addressing the universal jurisdiction issue.⁹⁴⁰

In an unrelated case, *Republic of the Congo (ROC) vs. France*, France sought to establish universal jurisdiction as a matter of customary international law⁹⁴¹ over the ROC President and other high-ranking ROC officials for alleged crimes against humanity and torture.⁹⁴² The ICJ again ducked the issue of universal jurisdiction by refusing to intercede at such a preliminary stage in France's investigation.⁹⁴³ Spain, Belgium and France are not alone in seeking to exercise universal jurisdiction over war crimes and other international crimes:

Other states, including the Netherlands, Switzerland, Denmark, Australia, and Germany have recently used the Geneva Conventions to prosecute war criminals for acts committed by non-nationals against non-nationals living abroad. England has similarly adopted an act easing the procedure necessary to bring a case under the Geneva Conventions.⁹⁴⁴

embarrassment for the Belgian Government, which has promised to make it harder for international claims to be launched in Belgian courts"), available at <http://news.bbc.co.uk/1/hi/world/europe/2066808.stm> (last visited Mar. 27, 2006). International comity would seem to limit *in absentia* trials, particularly with regard to sitting heads of State.

⁹⁴⁰ Dem. Rep. Congo v. Belg., 2002 I.C.J. at paras. 41, 42, 43 & 45. *Accord* Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002 (reporting a Belgium court's ruling that the case against Ariel Sharon could not be brought because he was not in Belgium), available at <http://news.bbc.co.uk/1/hi/world/europe/2066808.stm> (last visited Mar. 27, 2006). See also Barrett, *supra* note 159, at 470 & n. 176; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005) (despite the fact that the parties requested that the ICJ not address the viability of universal jurisdiction, there appeared to be a fairly even split between the ICJ judges on the issue).

⁹⁴¹ See DINSTEIN, *supra* note 2, at 228.

⁹⁴² Certain Legal Proceedings in France (Dem. Rep. Congo v. Fr.), 2003 I.C.J. 129, paras. 10 & 11 (July 11), available at http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iorder_20030617.PDF (last visited Mar. 12, 2006).

⁹⁴³ *Id.* at paras. 35, 37, 38 & 41.

⁹⁴⁴ Barrett, *supra* note 159, at 471-72. See also Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM.J.INT'L L. 291, 297-98 (Apr. 1999). Cf. Sriram, *supra* note 17, at 317-31 (noting that Spain, Belgium, the United Kingdom, France, Switzerland,

By contrast, most U.S. criminal statutes either expressly or implicitly require a connection to the United States or to a U.S. national, and thus do not assert universal jurisdiction.⁹⁴⁵ Even the federal genocide statute requires that the offense occur in the United States or that the offender be a U.S. national.⁹⁴⁶ A federal torture statute does assert universal jurisdiction in that it criminalizes acts of official torture committed in foreign nations by foreign citizens, but there are no reported cases actually applying that statute.⁹⁴⁷ In terms of *civil* cases, a number of U.S. courts have asserted universal jurisdiction in the context of international human rights litigation.⁹⁴⁸ Thus, the United States does not appear as willing as European States to assert extraterritorial *criminal* jurisdiction under the rubric of universality, and yet appears more willing to assert extraterritorial *civil* jurisdiction.

E. International Tribunals

The IMT in Nuremberg after World War II was the first modern *ad hoc* international tribunal for the prosecution of war crimes, crimes against humanity, and the crime of aggression. It was *ad hoc* because it was created after the atrocities had been committed, and because it was not a permanent court – thus its jurisdiction was limited both geographically and temporally.⁹⁴⁹ It was *international* because it was run by the four Allied powers, and because it was

Germany, Ecuador, Amsterdam and Chile all had complaints filed against General Pinochet for crimes during his rule, asserting universal jurisdiction *inter alia*). See generally *id.* at 318-55 (discussing various cases where universal jurisdiction was asserted in a number of countries).

⁹⁴⁵ BRADLEY & GOLDSMITH, *supra* note 10, at 536.

⁹⁴⁶ *Id.*

⁹⁴⁷ *Id.*

⁹⁴⁸ *Id.* See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁹⁴⁹ Cf. *supra* note 104 and accompanying text (Professor Wedgwood's criticism of the IMT for not considering the *Allied* war crimes). Perhaps this is more of a "victor/vanquished" limitation than a geographical limitation. Of course, the IMT was limited temporally to those atrocities committed during the hostilities of World War II, beginning in 1939 and ending in 1945.

supported by nineteen other signatories to the London Agreement.⁹⁵⁰ Therefore, it is perhaps not overly surprising that when the need next arose for international *fora* to adjudicate claims of genocide, crimes against humanity, and war crimes, the United Nations (UN), also a product of the Second World War, would fall back on the *ad hoc* Nuremberg model. Of course, no *permanent* International Criminal Court (ICC) yet existed, and arguably, perhaps, there was insufficient support for the establishment of a permanent ICC at the time.⁹⁵¹

Thus, the *ad hoc* international tribunals may be viewed as preliminary efforts at establishing a more permanent ICC, or as the UN ‘testing the waters.’

1. ICTY

The next occasion after the IMT when another international criminal tribunal was both necessary and feasible⁹⁵² was when “[t]he mass rapes and genocidal acts in Yugoslavia induced the [UN] Security Council to set up a special [*ad hoc*] tribunal in 1993 to punish those responsible.”⁹⁵³ Before the UN Security Council (UNSC)

⁹⁵⁰ Randall, *supra* note 10, at 801.

⁹⁵¹ After coalition forces drove Saddam Hussein out of Kuwait in the First Gulf War in 1991, the lack of an international criminal court prevented any type of war crimes trial for atrocities committed by Saddam. Professor Ferencz has described this as a “political blunder,” where “[p]olitics prevailed over principle.” Ferencz, *supra* note 71, at 227. Instead, a civil compensation commission was created to provide civil remedies for people harmed in the war. Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005). However, war crimes proceedings were initiated in Belgium courts under the rubric of universal jurisdiction over Saddam Hussein, as well as Israeli Prime Minister Ariel Sharon, Palestinian leader Yasser Arafat, Cuban President Fidel Castro, and Ivory Coast President Laurent Gbagbo. Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002, available at <http://news.bbc.co.uk/1/hi/world/europe/2066808.stm> (last visited Mar. 27, 2006).

⁹⁵² An international tribunal was not feasible until the end of the Cold War stalemate on the United Nations Security Council. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; Ferencz, *supra* note 71, at 226: “The ideological war between the Soviet Union and the United States influenced every decision. United Nations committees operated on the principle of consensus; that meant, in effect, that every member could veto anything.” Another explanation for the resurrection of international *fora* was the sense that a climate of impunity” had developed, whereby despised dictators made amnesty for their offenses the price of their stepping down from power (e.g. Uruguay, Argentina, & Chile). Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005). “When domestic leaders exempt themselves from liability, all you can do is hold individuals accountable at the international level.” *Id.*

⁹⁵³ Ferencz, *supra* note 71, at 243. See also ROBERTS & GUELFF, *supra* note 5, at 565 (describing the series of wars associated with the breakup of the former Socialist Federal Republic of Yugoslavia as “consist[ing] as much of successive actions against civilians as of organized combat between armed forces,” and thus “necessarily involv[ing] violations of the laws of war”).

decided to establish the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague, Netherlands, other options were considered, including the use of domestic criminal tribunals. These were judged to be of limited utility because of the destruction of the physical and human resources necessary for complex criminal trials, and due to divergent concerns that either hostile courts would afford too *little* due process to defendants, or that sympathetic governments would *shield* defendants from trial, perhaps by granting amnesty.⁹⁵⁴

Therefore it was recognized that an *international* criminal tribunal, such as the IMT at Nuremberg, needed to be established, with primacy over domestic courts.⁹⁵⁵ However, instead of pursuing this new international criminal tribunal through the customary, tedious treaty process (by which the IMT Charter had been created), interested governments and non-governmental organizations (NGOs) jump-started the process by convincing the UNSC to create the new international criminal tribunal pursuant to Chapter VII of the UN Charter.⁹⁵⁶

On May 25, 1993 the UNSC established the ICTY by *fiat*, prescribed its structure, defined its jurisdiction, and instructed all UN-member States to cooperate with the new court by turning over custody of suspects, evidence and witnesses.⁹⁵⁷ More specifically, the UNSC established the ICTY's jurisdiction over grave breaches of the four 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity committed since January 1, 1991

⁹⁵⁴ JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS*, 600 (2002).

⁹⁵⁵ Statute of the International Criminal Tribunal for the Former Yugoslavia [hereinafter ICTY Statute], S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808, arts. 9 & 10 (1993), *annexed to Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 & Add. 1 (1993); ROBERTS & GUELFF, *supra* note 5, at 568.

⁹⁵⁶ DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 600. Thus, the *consent* of States to support this new tribunal (e.g. by entering a multilateral treaty establishing the court) was deemed less important than establishing the ICTY efficiently and effectively. JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW*, 260 (2002).

⁹⁵⁷ DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 601. *See also* ROBERTS & GUELFF, *supra* note 5, at 566.

in the territory of the former Socialist Federal Republic of Yugoslavia.⁹⁵⁸ The second category of “violations of the laws or customs of war” was included to ensure that the ICTY could prosecute individuals for war crimes not rising to the level of *grave breaches* of the four 1949 Geneva Conventions.⁹⁵⁹ A former prosecutor at the Nuremberg war crimes trials opined that the ICTY “was a long-overdue building block on the edifice started at Nuremberg.”⁹⁶⁰

The ICTY has carefully chosen which alleged crimes to investigate and to prosecute,⁹⁶¹ both to maintain the court’s legitimacy, and to maintain the support of States upon which it relies to secure custody over criminal defendants, since the ICTY lacks its own international police force.⁹⁶² The ICTY has successfully completed criminal proceedings against eighty-five defendants,⁹⁶³ although its

⁹⁵⁸ ICTY Statute, *supra* note 182, at Arts. 2–5, 8. The UNSC did not include the crime of aggression within the ICTY’s jurisdiction because the topic was too politically-charged. Sean D. Murphy, International Organizations lecture at the George Washington University School of Law (Oct. 31, 2005). The fact that the UNSC included grave breaches of the four 1949 Geneva Conventions within the ICTY’s jurisdiction supports the view that these rules had become rules of customary international law, because after the breakup of the former Yugoslavia, it was unclear that all of the new national entities had acceded to the four 1949 Geneva Conventions, and thus would not have been bound by their provisions as a matter of treaty law. Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Feb. 21, 2006). It is also interesting to note the fact that the UNSC did *not* include violations of Additional Protocol I (AP I) to the Geneva Conventions within the ICTY’s jurisdiction, thus supporting the U.S. view that provisions of AP I have *not* risen to the level of customary international law. *Id.*

⁹⁵⁹ ICTY Statute, *supra* note 182, at Art. 3. This was particularly important for atrocities committed during those periods and locations of the Balkan conflict that were considered to be under civil war, because only common Article 3 of the four 1949 Geneva Conventions would apply to such a noninternational armed conflict. By including this category of “violations of the laws or customs of war,” the UNSC was forestalling the possible defense, raised at Nuremberg, of *nullum crimen sine lege* (no crime without law). DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 582-83. *See also* ROBERTS & GUELFF, *supra* note 5, at 566-67.

⁹⁶⁰ Ferencz, *supra* note 71, at 228.

⁹⁶¹ For example, the ICTY prosecutor elected not to investigate alleged excessive environmental damage (caused by the North Atlantic Treaty Organization (NATO) bombing of Kosovo) as a war crime, because of lack of specificity in defining this as a war crime. Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Feb. 7, 2006); Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, June 8, 2000.

⁹⁶² Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005).

⁹⁶³ *ICTY At a Glance*, available at <http://www.un.org/icty/glance-e/index.htm> (last visited Apr. 10, 2006); Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005); DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 380-382, 589-594; KLABBERS, *supra* note 183, at 183-85.

highest profile defendant, former Yugoslav president Slobodan Milosevic, recently died in captivity on March 11, 2006 while his trial was ongoing.⁹⁶⁴

2. ICTR

Only a year after the UNSC had established the ICTY to prosecute atrocities in the former Yugoslavia, atrocities in another war-torn country presented the need for the formation of a second international criminal tribunal:

In 1994, over half a million people were brutally butchered during ethnic conflicts and genocidal slaughter in Rwanda. The massacres could have been prevented but those with the power to halt the killings lacked the will, wisdom or political courage to take the military risks. Instead, in response to justified cries of universal indignation, the Security Council promptly created another ad hoc tribunal [nearby in Arusha, Tanzania] for crimes committed in Rwanda.⁹⁶⁵

There are important similarities between the International Criminal Tribunal for Rwanda (ICTR) and its predecessor, the ICTY. On November 8, 1994, the UNSC established the ICTR again by *fiat* acting under Chapter VII of the UN Charter, prescribing a similar structure,⁹⁶⁶ defining similar primary jurisdiction over genocide and crimes against humanity, and similarly directing UN-member States to cooperate with the new court.⁹⁶⁷ Both courts lack the death penalty,

⁹⁶⁴ *Milosevic Found Dead in His Cell*, available at <http://news.bbc.co.uk/2/hi/europe/4796470.stm> (last visited Apr. 10, 2006).

⁹⁶⁵ Ferencz, *supra* note 71, at 228, 243. See also ROBERTS & GUELFF, *supra* note 5, at 615 (noting that “[d]uring the three-month period from April to July 1994 an estimated half million to one million people were killed in Rwanda in massacres widely viewed... as the clearest case of genocide since the Second World War.”); Justice Anthony Kennedy, ASIL 100th Mtg., *supra* note 27, Plenary Address, Mar. 30, 2006 (“the world was warned, but waited, watched, and wept but little [regarding Rwanda]”).

⁹⁶⁶ Initially the ICTY and ICTR even shared the same prosecutor, and they continue to share the same appeals chamber. Statute of the International Criminal Tribunal for Rwanda [hereinafter ICTR Statute], S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955, arts. 12 & 15 (1994).

⁹⁶⁷ *Id.* at Arts. 2, 3 & 8; ROBERTS & GUELFF, *supra* note 5, at 616. Although Rwanda, who happened to be serving on the UNSC at the time, was in favor of establishing an international tribunal, it cast the sole opposing vote for a number of reasons, including the fact that the ICTR lacked the death penalty and was based outside Rwanda. *Id.*

which is particularly ironic for the ICTR, since lesser cases of genocide were prosecuted in domestic Rwandan courts, leading to the execution of those convicted.⁹⁶⁸

Although the ICTR was patterned after the ICTY, there are also important differences. The ICTR has a more restrictive temporal limit on its jurisdiction (only covering offenses committed in 1994 versus offenses committed after January 1, 1991 for the ICTY), but a more relaxed geographical jurisdiction (territory of Rwanda plus Rwandan citizens committing genocide and other violations in the territory of neighboring States versus merely the territory of the former Yugoslavia for the ICTY).⁹⁶⁹ Many of the differences between the ICTR and ICTY arise from the fact that the conflict in Rwanda was almost exclusively an internal conflict, whereas the conflict in the former Yugoslavia was both an international and a non-international armed conflict.⁹⁷⁰ Therefore the ICTR Statute does not require a connection between crimes against humanity and armed conflict as does the ICTY Statute,⁹⁷¹ and the ICTR refers to violations of Common Article 3 of the four 1949 Geneva Conventions and the 1977 Additional Protocol II to the Geneva Conventions (covering noninternational armed conflict) rather than to violations of the laws and customs of war as does the ICTY Statute.⁹⁷² Although the focus in Rwanda (like the former Yugoslavia) was on criminal punishment, there was also a parallel process of “Truth and Reconciliation” in Rwanda to deal with the 100,000 criminal suspects in custody⁹⁷³ as well as creating an

⁹⁶⁸ ROBERTS & GUELFF, *supra* note 5, at 616, 617.

⁹⁶⁹ ICTR Statute, *supra* note 193, at Preamble & Art. 7.

⁹⁷⁰ ROBERTS & GUELFF, *supra* note 5, at 616.

⁹⁷¹ Compare ICTR Statute, *supra* note 193, at Art. 3 with ICTY Statute, *supra* note 182, at Art. 5. See also ROBERTS & GUELFF, *supra* note 5, at 616; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005).

⁹⁷² Compare ICTR Statute, *supra* note 193, at Art. 4 with ICTY Statute, *supra* note 182, at Art. 3. See also ROBERTS & GUELFF, *supra* note 5, at 616.

⁹⁷³ Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005). See also ROBERTS & GUELFF, *supra* note 5, at 617. Cf. Sriram, *supra* note 17, at 385 (noting that “[t]ruth commissions may be one tool to address the pain of the victims”).

acknowledged record of the atrocities.⁹⁷⁴ The ICTR has successfully completed criminal proceedings against twenty defendants.⁹⁷⁵

3. Effectiveness of ICTY and ICTR

Reviews of the effectiveness of the two *ad hoc* international criminal tribunals have varied in their level of praise or criticism. On the one hand are commendatory claims that “[d]espite initial start-up problems, the ad hoc tribunals have been functioning reasonably well and have been creating important precedents to uphold and expand international humanitarian law,”⁹⁷⁶ and at least one claim that the number of internal armed conflicts has declined substantially since the formation of the ICTY and ICTR.⁹⁷⁷

However, on the other hand are a variety of criticisms of the two *ad hoc* international criminal tribunals: whether the UNSC had the authority to create judicial sub-organs in the first place;⁹⁷⁸ whether *ad hoc* courts are effective as a deterrent, since many of the most serious atrocities occurred in the former Yugoslavia *after* the ICTY had been established;⁹⁷⁹ whether the two international criminal tribunals are too far removed from the citizenry⁹⁸⁰ and too inefficient,⁹⁸¹

⁹⁷⁴ United States Institute for Peace, *Rwanda: Accountability for War Crimes and Genocide*, available at <http://www.usip.org/pubs/specialreports/early/rwanda3.html> (last visited Apr. 10, 2006); Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005).

⁹⁷⁵ *ICTR Status of Cases*, available at <http://65.18.216.88/ENGLISH/cases/status.htm> (last visited Apr. 10, 2006).

⁹⁷⁶ Ferencz, *supra* note 71, at 228.

⁹⁷⁷ Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005).

⁹⁷⁸ DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 601; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005); KLABBERS, *supra* note 183, at 183-85.

⁹⁷⁹ ROBERTS & GUELFF, *supra* note 5, at 567.

⁹⁸⁰ Sriram, *supra* note 17, at 312-14 (concluding that “[p]ursuing such “globalitarian” concerns may come at the cost of local needs,” and that mixed tribunals may pursue international justice while still pursuing local needs). *Accord* Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005) (promoting “mixed tribunals,” like the one in Sierra Leone, which uphold international accountability as well as helping to remedy the defects in the domestic criminal

which has led for a push for them to complete their temporary mandates and be brought to an end;⁹⁸² and even whether the two *ad hoc* tribunals invade the province of military commanders if they engage in “micro-fact-finding” of operational law versus enforcing “massacre law.”⁹⁸³ Thus, the two *ad hoc* international criminal tribunals would appear to be at most a partial success. However, the geographically and temporally limited jurisdiction of the *ad hoc* tribunals, as well as their inefficiency,⁹⁸⁴ provided the incentive for finally establishing a permanent International Criminal Court,⁹⁸⁵ which would “obviate[e] the need to create such *ad hoc* tribunals in the future.”⁹⁸⁶

4. ICC

Although there is a long history of efforts to establish a permanent International Criminal Court (ICC),⁹⁸⁷ the lessons learned from the ICTY and ICTR provided the necessary impetus to finally bring the concept of an ICC into reality.⁹⁸⁸ Modern efforts to establish an ICC began with, and naturally followed from the

system, rather than establishing an international tribunal in another country with international judges, which only leaves a broken and corrupt domestic judicial system).

⁹⁸¹ Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005) (promoting “mixed tribunals” as being more efficient than UN sponsored *ad hoc* tribunals because of the voluntary contributions for mixed tribunals, which place a premium on efficiency). In the ten years since their creation, each of the *ad hoc* tribunals has completed no more than half of their respective caseloads. *Compare Key Figures of ICTY Cases*, available at <http://www.un.org/icty/glance-e/index.htm> (last visited Apr. 10, 2006) (89 cases completed out of 161 indictments for the ICTY) *with ICTR Status of Cases*, available at <http://65.18.216.88/ENGLISH/cases/status.htm> (last visited Apr. 10, 2006) (20 cases completed out of 58 indictments for the ICTR).

⁹⁸² DUNOFF, RATNER & WIPPMAN, *supra* note 181, Updates, Chapter 9, available at <http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm> (last visited Apr. 10, 2006).

⁹⁸³ Ruth Wedgwood, Cummings Symposium, *supra* note 39, Sep. 30, 2005.

⁹⁸⁴ Ferencz, *supra* note 71, at 228; Barrett, *supra* note 159, at 470.

⁹⁸⁵ Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005).

⁹⁸⁶ ROBERTS & GUELFF, *supra* note 5, at 667.

⁹⁸⁷ *See supra* Part II.B.

⁹⁸⁸ Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *Contra* Ruth Wedgwood, *id.*

International Military Tribunals at Nuremberg and Tokyo. France proposed such a court in 1947, and when the UN General Assembly adopted the Genocide Convention in 1948, it asked the International Law Commission (ILC) to study the possibility of establishing an ICC for the punishment of genocide and other crimes.⁹⁸⁹ The ILC submitted its report in 1950, concluding that the establishment of such a court was possible, but by then the Cold War had begun, and “consideration of the question proved to be complex and contentious.”⁹⁹⁰ Specifically, “[t]he absence of an agreed upon definition of aggression was the excuse given for lack of progress toward an international criminal court. Debates were interminable and inconclusive.”⁹⁹¹

Almost four decades later in 1989, Trinidad and Tobago revived the concept by making the relatively modest suggestion of establishing an ICC to only handle international drug trafficking cases – the UN General Assembly again passed the idea to the ILC for study.⁹⁹² The implosion of the former Soviet Union in 1990 had two repercussions vis-à-vis the ICC: first, the lack of US/USSR pressures led to outbreaks of violence (e.g. in Yugoslavia) and hence revealed the *need* for international *fora*; second, East-West tensions eased, thereby removing the major *obstacle* to the ICC.⁹⁹³ The UN Security Council primed the ICC pump by establishing the two *ad hoc* international tribunals in 1993 and 1994.⁹⁹⁴ The ILC kept the process going by submitting its draft statute for the ICC to the UN

⁹⁸⁹ ROBERTS & GUELFF, *supra* note 5, at 667.

⁹⁹⁰ *Id.*; Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

⁹⁹¹ Ferencz, *supra* note 71, at 226.

⁹⁹² DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606. *Cf.* ROBERTS & GUELFF, *supra* note 5, at 667 (noting that UN consideration of an ICC was within the framework of the ILC’s discussion of a draft Code of Offences Against the Peace and Security of Mankind, until the two issues were separated in 1992). The ILC forwarded its draft Code of Offences Against the Peace and Security of Mankind to the UN General Assembly in 1996, but by that time, preparatory work for the ICC was in full swing, and the draft Code was overcome by events. Randall, *supra* note 10, at 827-28.

⁹⁹³ Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

⁹⁹⁴ *Id.* See *supra* Part II.E.1-2.

General Assembly in 1994.⁹⁹⁵ The next year, the UN General Assembly established a “Preparatory Committee on the Establishment of an International Criminal Court,” which met six times from 1996 to 1998 to prepare a draft convention “for consideration by an international conference in 1998, which would coincide with the fiftieth anniversary of the 1948 Genocide Convention.”⁹⁹⁶ Thus the stage was set for the Rome Conference.

The Rome Conference was a “final frenetic month of negotiations,”⁹⁹⁷ culminating in the final vote on the Statute of the ICC:

On 15 June 1998, delegations from 160 states...(with thirty one intergovernmental organizations... and 135 non-governmental organizations attending as observers) met in Rome at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to finalize the Statute, which was adopted on 17 July 1998 with a vote of 120 in favour, seven against and twenty-one abstentions, and opened for signature on the same day.⁹⁹⁸

The negative vote by the United States was a disappointment to the rest of the Rome Conference for two reasons: first, the United States had been a somewhat

⁹⁹⁵ Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606.

⁹⁹⁶ ROBERTS & GUELFF, *supra* note 5, at 667. *See* Ferencz, *supra* note 71, at 228; Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606.

⁹⁹⁷ DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606. *Cf.* Ferencz, *supra* note 71, at 229. Besides the desire to complete the ICC Treaty to coincide with the fiftieth anniversary of the 1948 Genocide Convention, there was also a push to “finish by the millennium,” and “gotta get it done in five weeks.” Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. Thus “the whole atmosphere in Rome was wrong,” and major States did not join (Russia, India, China, US). *Id.* Ambassador Scheffer, the lead U.S. representative at the Rome Conference, agrees that there was a “rush to judgment” in Rome and that the fair request by the United States for an extension of time should have been granted. Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006. He also noted that the “U.S. team had deep disappointment in the rush for gratification of concluding the treaty conference on time [when] often treaty conferences extend their deadline[s].” *Id.* The “rush to judgment” in Rome also led to the UN Secretary General, as the Depositary, needing to correct approximately seventy “technical errors” in the text of the Rome Statute. ROBERTS & GUELFF, *supra* note 5, at 668, 671.

⁹⁹⁸ ROBERTS & GUELFF, *supra* note 5, at 667. *Cf.* DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 609 (noting that because the vote was not officially recorded, there is some uncertainty as to which States other than the United States voted no, but most lists include China, Iraq, Israel, Libya, Qatar & Yemen).

consistent supporter of the ICC over the years,⁹⁹⁹ and second, because many concessions had been made to satisfy U.S. concerns.¹⁰⁰⁰ The Rome Statute garnered another 19 signatures by the end of 2000,¹⁰⁰¹ including that of Ambassador Scheffer of the United States.¹⁰⁰² However, the United States subsequently expressed its intent not to ratify the treaty, and its belief that the United States was therefore under no legal obligations arising from Ambassador Scheffer's signature.¹⁰⁰³ Nevertheless, the sixtieth State ratified the Rome

⁹⁹⁹ Compare Ferencz, *supra* note 71, at 243 ("For almost a century, the United States government was in the forefront of those advocating an international criminal jurisdiction.") and ROBERTS & GUELFF, *supra* note 5, at 668 (U.S. opposition to ICC was ironic in having been an early and leading proponent of such a court and a continuing strong supporter of the ICTY and ICTR) and Ferencz, *supra* note 71, at 228 ("In 1997, President Clinton addressed the United Nations and called for the early establishment of a permanent International Criminal Court.") with Ferencz, *supra* note 71, at 226 (U.S. support for the ICC vacillated during the Cold War) and Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006 (US was for the ICC originally, but a modest ICC to include UNSC referrals only).

¹⁰⁰⁰ Ferencz, *supra* note 71, at 229.

¹⁰⁰¹ Rome Statute, *supra* note 6, at Art. 125(1); Associate Dean Susan L. Karamanian, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁰² Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 611-12. *See also* Ferencz, *supra* note 71, at 237-38:

After careful consideration in the White House, President Clinton instructed United States Ambassador David Scheffer to sign the Rome Statute just as the deadline was about to expire on December 31, 2000. Israel promptly followed suit. Signing was a reaffirmation of America's historical commitment to international accountability ever since Nuremberg. Knowing that there was no prospect of getting two-thirds of the Senators to consent, Clinton, seeking to mollify both right-wingers and human rights activists, said he would not recommend that it be submitted for ratification. He wanted the United States to stay engaged in order to help shape the Court and remain a key player.

¹⁰⁰³ *Press Statement*, Richard Boucher, Spokesman, *International Criminal Court: Letter to UN Secretary General Kofi Annan*, available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> (last visited Apr. 10, 2006). *Accord* Ferencz, *supra* note 71, at 238; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 612. Not too unsurprisingly, President Bush had the protégé of Senator Jesse Helms (a staunch opponent of the ICC) write the letter to the UN Secretary General. *Press Statement*, Richard Boucher, Spokesman, *International Criminal Court: Letter to UN Secretary General Kofi Annan*, available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> (last visited Apr. 10, 2006). That protégé was, of course, John Bolton, who is now the U.S. Ambassador to the UN. *Announcement of Nomination of John Bolton as U.S. Ambassador to the UN*, available at <http://www.state.gov/secretary/rm/2005/43062.htm> (last visited Apr. 10, 2006). Ambassador Bolton apparently believes that "international law is not really law since it is not binding or enforceable" and "[h]e considered the Rome Statute too vague." Ferencz, *supra* note 71, at 233-34. The purpose of "unsigned" the Rome Statute was in order not to be bound by the requirement not to defeat the object and purpose of the treaty, which is required by treaty signatories even before ratification, pursuant to Article 18 of the Vienna Convention of the Law of Treaties. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. Although the United States is not a party to the VCLT, it considers the VCLT to represent customary international law. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *See infra* note 314. This "unsigned" may have been in anticipation of a more active opposition to the ICC, such as entering Article 98 agreements with other States to circumvent the ICC's jurisdiction. Ferencz,

Statute on April 11, 2002,¹⁰⁰⁴ and the Convention entered in to force on July 1, 2002.¹⁰⁰⁵

Before discussing the U.S. objections to the ICC, it is important to note the five significant hurdles that must be overcome before a case can be brought before the ICC. First, temporally the ICC only has jurisdiction over war crimes and other offenses committed after the Rome Statute entered into force on July 1, 2002, or when a State subsequently signs the treaty, unless a State agrees to apply the Rome Statute retroactively.¹⁰⁰⁶ This period can be delayed by seven years specifically for war crimes, as France has so elected.¹⁰⁰⁷

The second significant jurisdictional hurdle for the ICC is geographical: generally, the crime either has to have been committed within the territory of a State party,¹⁰⁰⁸ or committed by a national of a State party.¹⁰⁰⁹ The only two exceptions to this general geographical rule are if a non-party State enters into an *ad hoc* agreement to allow crimes committed within its territory or by its nationals to go to the ICC,¹⁰¹⁰ or if the UN Security Council, acting under Chapter VII of the UN

supra note 71, at 236. *See infra* Part II.E.4. However, the fact that the United States is still technically a signatory to the Rome Statute means that it retains the right to sit as an observer in the Assembly of States Parties. Rome Statute, *supra* note 6, at Art. 112(1). *See infra* note 323 and accompanying text.

¹⁰⁰⁴ Ferencz, *supra* note 71, at 238; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 612. *See also* Rome Statute, *supra* note 6, at Arts. 11, 126(1). Ninety-four States had ratified the Rome Statute by May 3, 2005. Associate Dean Susan L. Karamanian, ICC Panel, *supra* note 89, Feb. 13, 2006. Requiring sixty States to ratify the Rome Statute before it went into force was a fairly high threshold, comparable to “the 1982 Convention on the Law of the Sea and close to the sixty-five [ratifications necessary] for the 1993 Chemical Weapons Convention.” ROBERTS & GUELFF, *supra* note 5, at 668.

¹⁰⁰⁵ Ferencz, *supra* note 71, at 238; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 612.

¹⁰⁰⁶ Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁰⁷ Rome Statute, *supra* note 6, at Arts. 8 & 124; ROBERTS & GUELFF, *supra* note 5, at 670; Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁰⁸ Rome Statute, *supra* note 6, at Art. 12(2)(a); Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁰⁹ Rome Statute, *supra* note 6, at Art. 12(2)(b); Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. Thus, technically the ICC itself does not rely upon the principle of universal jurisdiction, but on the more traditional jurisdictional bases asserted on behalf of its State parties.

¹⁰¹⁰ Rome Statute, *supra* note 6, at Art. 12(3). For example, the Democratic Republic of Congo (formerly Zaire) entered into such an *ad hoc* agreement in April 2004. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

Charter, refers matters to the ICC, regardless of whether the State involved is a party to the treaty or not.¹⁰¹¹

The third important hurdle before a case can be brought before the ICC relates to subject matter jurisdiction: Article 5 of the Rome Statute provides that “[t]he jurisdiction of the Court shall be limited to the *most serious* crimes of concern to the international community as a whole,” and then lists only four general crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.¹⁰¹²

Only the first three crimes are defined with any more specificity.¹⁰¹³ The second paragraph of Article 5 notes that the crime of aggression is as of yet undefined the earliest this could happen would be in the year 2009, when State parties may first revise the Rome Statute, but the definition of the crime of aggression would not apply to State parties who do not ratify the amendment.¹⁰¹⁴

The fourth major hurdle to ICC jurisdiction is the principle of complementarity: unlike the ICTY and ICTR, which have primacy over domestic courts,¹⁰¹⁵ the ICC

¹⁰¹¹ Rome Statute, *supra* note 6, at Art. 13(b). For example, in March 2005, the UN Security Council referred Sudan to the ICC. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. The United States agreed that genocide was being committed in Darfur, and therefore it and the other three nonparties to the Rome Statute on the UN Security Council abstained from voting on the matter. Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005).

¹⁰¹² Rome Statute, *supra* note 6, at Art. 5(1) (emphasis added). *See also id.* at Art. 17(1)(d) (noting that the ICC shall rule a case inadmissible if it “is not of sufficient gravity to justify further action by the Court”).

¹⁰¹³ Rome Statute, *supra* note 6, at Arts. 6-8. *See supra* note 9 and accompanying text.

¹⁰¹⁴ Rome Statute, *supra* note 6, at Arts. 5(2), 121, 123; Henry T. King, Jr., Remarks at 3-4, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005; ROBERTS & GUELFF, *supra* note 5, at 670. Another irony of the ICC is that while Justice Jackson thought the crime of aggression was the most serious crime at the IMT in Nuremberg (Ferencz, *supra* note 71, at 225; Henry T. King, Jr., Remarks at 3, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005), it was also the excuse given during the Cold War for lack of progress towards an ICC (*see supra* note 220 and accompanying text), and yet the crime of aggression remains “inherently politicized” and is a “huge albatross around the ICC’s neck, which could kill it,” (Sir Franklin Berman, Cummings Symposium, *supra* note 39, Sep. 30, 2005) and is one of the arguments the United States puts forth in opposition to the ICC (*see infra* notes 311-16 and accompanying text).

¹⁰¹⁵ *See supra* notes 184, 194 and accompanying text.

turns primacy on its head by giving precedence to domestic courts.¹⁰¹⁶ The ICC will not assert jurisdiction over a case if:

(a) *The case is being investigated or prosecuted* by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) *The case has been investigated* by a State which has jurisdiction over it *and the State has decided not to prosecute the person* concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
[or]

(c) *The person concerned has already been tried* for conduct which is the subject of the complaint.¹⁰¹⁷

“Unwillingness” is defined as either shielding the person from criminal responsibility, or unjustifiably delaying or conducting the proceedings in a way “inconsistent with an intent to bring the person concerned to justice,” or not conducting the proceedings in an independent and impartial manner.¹⁰¹⁸ “Inability” is defined as the “total or substantial collapse” of the domestic judicial system to the point where the State can either not gain custody over the accused, or the necessary evidence and testimony, or otherwise is unable to carry out its proceedings.¹⁰¹⁹ A person who has “already been tried” is subject to similar requirements as the definition of unwillingness.¹⁰²⁰

¹⁰¹⁶ Rome Statute, *supra* note 6, at Art. 17; ROBERTS & GUELFF, *supra* note 5, at 668-69.

¹⁰¹⁷ Rome Statute, *supra* note 6, at Art. 17(1) (emphasis added).

¹⁰¹⁸ *Id.* at Art. 17(2).

¹⁰¹⁹ *Id.* at Art. 17(3).

¹⁰²⁰ *Id.* at Art. 20(3).

A fifth principal hurdle to ICC jurisdiction is that the ICC prosecutor may only take action on a case if referred by: (a) the UN Security Council acting under Chapter VII of the UN Charter, as already noted,¹⁰²¹ (b) one of the State parties to the Rome Statute,¹⁰²² or (c) the prosecutor acting *proprio motu* (on his own accord).¹⁰²³ The ICC Prosecutor must “conclude[] that there is a reasonable basis to proceed with an investigation” before submitting an investigation authorization request to the Pre-Trial Chamber.¹⁰²⁴ A majority of a panel of the Pre-Trial Chamber must determine “that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court” before authorizing the ICC Prosecutor to commence the investigation.¹⁰²⁵ The ICC Prosecutor must then “notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.”¹⁰²⁶ A State has thirty days to inform the ICC “that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes [within the ICC’s

¹⁰²¹ *Id.* at Art. 13(b). See *supra* note 238 and accompanying text.

¹⁰²² Rome Statute, *supra* note 6, at Arts. 13(a) & 14.

¹⁰²³ *Id.* at Arts. 13(c) & 15.

¹⁰²⁴ *Id.* at Arts. 15(3) & 53(1). In fact, it appears that the Chief Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, has carefully exercised his responsibilities to ensure an investigation is warranted. In response to over 240 communications regarding alleged war crimes committed in Iraq, Mr. Moreno-Ocampo wrote a ten-page, carefully considered letter explaining the limits of his and the ICC’s mandate, and concluding that “the available information did not provide a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed” with regard to targeting of civilians or clearly excessive attacks. ICC Chief Prosecutor Luis Moreno-Ocampo, *Iraq Response letter* [hereinafter Iraq Response Letter] at 4-7, Feb. 9, 2006, available at http://www.icccpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last visited Apr. 10, 2006). With regard to allegations of “wilful killing or inhuman treatment of civilians,” Mr. Moreno Ocampo “concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed” for “four to twelve victims of wilful killing” and less than twenty victims of inhuman treatment. *Id.* at 7-8. Nevertheless, Mr. Moreno Ocampo concluded that the alleged wilful killing and inhuman treatment were not “committed as part of a plan or policy or as part of a large-scale commission of such crimes” as required by Article 8(1) of the Rome Statute before the ICC will exercise its jurisdiction over alleged war crimes. *Id.* At 8. Moreover, he found that the number of victims was of a much smaller magnitude than the three situations his office was investigating in Uganda, the Democratic Republic of Congo, and the Darfur region of Sudan, and thus “did not appear to meet the required threshold of the Statute.” *Id.* at 9. Without addressing complementarity, Mr. Moreno Ocampo noted that “national proceedings had been initiated with respect to each of the relevant incidents.” *Id.*

¹⁰²⁵ Rome Statute, *supra* note 6, at Arts. 15(4) & 57(2)(a).

¹⁰²⁶ Rome Statute, *supra* note 6, at Art. 18(1).

jurisdiction] and which relate to the information provided in the notification to States,” and to request that the ICC Prosecutor defer his investigation.¹⁰²⁷ “[T]he Prosecutor shall defer to the State’s investigation of those persons unless a majority of the seven judges on the Pre Trial Chamber, on the application of the Prosecutor, decides to [nevertheless] authorize the investigation,” in which case the State concerned may appeal to the Appeals Chamber on an expedited basis.¹⁰²⁸ The State concerned may again subsequently challenge the admissibility of the case before the ICC will hear the case.¹⁰²⁹ Finally, the UN Security Council, acting under Chapter VII of the UN Charter, may defer the investigation or prosecution of any case for renewable twelve-month periods.¹⁰³⁰ Despite these extensive controls on the ICC Prosecutor’s discretion, the fear that he might conduct politicized investigations remains one of the U.S. concerns about the ICC.¹⁰³¹

5. U.S. Objections to the ICC

The United States has a number of objections to the ICC, which appear to fall into four broad categories: (a) contrary to U.S.-centric view; (b) criminal exposure of U.S. service members; (c) criminal exposure of U.S. civilian and military leaders; and (d) efficiency.¹⁰³² Each of these will be examined in turn.

¹⁰²⁷ *Id.* at Art. 18(2).

¹⁰²⁸ *Id.* at Arts. 18(2), 18(4), 57(2)(a) & 82.

¹⁰²⁹ *Id.* at Arts. 19(2)(b) & 19(4).

¹⁰³⁰ *Id.* at Art. 16.

¹⁰³¹ Bureau of Political-Military Affairs, U.S. Department of State, *Fact Sheet, The International Criminal Court* [hereinafter ICC Fact Sheet], Aug. 2, 2002, available at <http://www.state.gov/t/pm/rls/fs/2002/23426.htm> (last visited Apr. 10, 2006). Professor Ferencz has noted that “no other Prosecutor in human history has been subjected to as many controls as exist in the ICC Statute.” Ferencz, *supra* note 71, at 231. See *infra* notes 301, 305-06 and accompanying text.

¹⁰³² See generally Jennifer Elsea, *U.S. Policy Regarding the International Criminal Court* [hereinafter U.S. ICC Policy], September 3, 2002, available at <http://fpc.state.gov/documents/organization/13389.pdf> (last visited Apr. 10, 2006).

a. Contrary to U.S.-Centric View

As one of the permanent five members¹⁰³³ of the UN Security Council, the United States can remain above the international fray, knowing that it effectively possesses a unilateral veto¹⁰³⁴ over any substantive actions taken by the UN Security Council, which has “primary responsibility for the maintenance of international peace and security.”¹⁰³⁵ Thus, not too surprisingly, the United States initially proposed that the ICC only have jurisdiction over matters referred to it by the UN Security Council, essentially making the ICC a permanent version of the two *ad hoc* tribunals with their limited mandates.¹⁰³⁶ Most other States and NGOs pressed for a court *independent* of the UN Security Council and the veto of the permanent members.¹⁰³⁷ The U.S. argued in support of its proposal that an ICC prosecution may delay or complicate the peace process,¹⁰³⁸ particularly if amnesty is the only means to achieve peace.¹⁰³⁹ However, as previously noted, the UN Security Council may defer the investigation or prosecution of any case for renewable twelve-month periods,¹⁰⁴⁰ which logically should allay U.S. concerns about interference with the UN Security Council’s control over the peace process.

A second U.S.-centric concern is the progressive development of international humanitarian law as interpreted by the ICC. The ICC’s interpretation of international humanitarian law might perhaps be at variance with the U.S. view,

¹⁰³³ U.N. Charter art. 23(1). The permanent five (or P-5) members are: “The [People’s] Republic of China, France, the [former] Union of Soviet Socialist Republics [now Russia], the United Kingdom of Great Britain and Northern Ireland, and the United States of America.” *Id.*

¹⁰³⁴ U.N. Charter art. 27(3). Technically, each of the permanent members does not possess a *veto* over substantive decisions made by the UN Security Council. However, their “concurring votes” are required for decisions on any non-procedural matters. *Id.*

¹⁰³⁵ U.N. Charter art. 24(1).

¹⁰³⁶ DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606; Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *See also* U.S. ICC Policy, *supra* note 259.

¹⁰³⁷ DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606.

¹⁰³⁸ Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰³⁹ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁴⁰ Rome Statute, *supra* note 6, at Art. 16. *See supra* note 257 and accompanying text.

particularly in areas of non-international armed conflict, the unsettled tension between human rights law and the law of war, or customary international law as it is developed by State practice.¹⁰⁴¹ Ambassador Scheffer's response is that the two *ad hoc* tribunals have effectively dealt with the issue of the progressive development of the law,¹⁰⁴² and thus there is no reason to expect that the ICC would be any different.

A third U.S.-centric concern is that U.S. nationals would not receive a fair trial as guaranteed by the U.S. Constitution.¹⁰⁴³ Yet the due process guarantees of the Rome Statute far exceed what would otherwise be available in domestic courts of foreign nations for war crimes committed abroad, and more closely mirror those guaranteed by the U.S. Bill of Rights than the rights guaranteed by other States.¹⁰⁴⁴ An accused person is presumed innocent, and the ICC Prosecutor has the burden to prove guilt beyond a reasonable doubt.¹⁰⁴⁵ In addition, the accused has the following rights:

1. In the determination of any charge, the accused shall be entitled to a public hearing . . . to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

¹⁰⁴¹ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁴² Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁴³ Ferencz, *supra* note 71, at 231-32. *Accord* Secretary of Defense Donald Rumsfeld, *Statement on the ICC Treaty* [hereinafter SECDEF ICC Statement], May 6, 2002, available at http://www.defenselink.mil/releases/2002/b05062002_bt233-02.html (last visited Apr. 10, 2006); U.S. ICC Policy, *supra* note 259. There may be at least some indication that "[t]he majority of the American people do not agree with the position on the ICC taken by the Bush Administration." Ferencz, *supra* note 71, at 245.

¹⁰⁴⁴ Ferencz, *supra* note 71, at 231-32.

¹⁰⁴⁵ Rome Statute, *supra* note 6, at Art. 66.

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) ... to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. . . . the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.¹⁰⁴⁶

Even with respect to admissions of guilt, the Rome Statute ensures that the admission was voluntarily made, is supported by the facts, and that the accused understands the nature and consequences of his admission.¹⁰⁴⁷ The ICC has rules of evidence to ensure relevancy and admissibility of evidence, as well as rules of procedure.¹⁰⁴⁸ There are also provisions for appeals of convictions.¹⁰⁴⁹ The only two significant incidents of U.S. jurisprudence missing at the ICC are jury trials and the death penalty. Jury trials would likewise be missing in many foreign domestic criminal trials for war crimes committed abroad, to which the protections of the U.S. Constitution also would not apply.¹⁰⁵⁰ Although the ICC lacks the death penalty,¹⁰⁵¹ the penalties imposed by the ICC do not “affect[] the application by States of penalties prescribed by their national law,” which would arguably include the imposition of the death penalty.¹⁰⁵² The absence of jury trials and the imposition of the death penalty do not otherwise detract from the fairness of ICC trials.

¹⁰⁴⁶ Rome Statute, *supra* note 6, at Art. 67.

¹⁰⁴⁷ *Id.* at Art. 65.

¹⁰⁴⁸ *Id.* at Arts. 68-74, 76-78.

¹⁰⁴⁹ *Id.* at Arts. 81-85.

¹⁰⁵⁰ Ferencz, *supra* note 71, at 233.

¹⁰⁵¹ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁵² Rome Statute, *supra* note 6, at Art. 80; ROBERTS & GUELFF, *supra* note 5, at 670.

A fourth U.S.-centric concern is the possibility of domestic tribunals “dumping” their cases on the ICC rather than dealing with them directly.¹⁰⁵³ However, the ICC will find that a case is inadmissible if “[t]he case is not of sufficient gravity to justify further action by the Court.”¹⁰⁵⁴ Moreover, this would seem to be, at this point, merely a theoretical concern since the ICC currently has only had four situations referred to it.¹⁰⁵⁵ Should this problem present itself at some point in the future, it could be addressed at that time.

The fifth and final U.S.-centric concern is that the ICC judges are unqualified, or as Professor Wedgwood put it so succinctly: “can a panel of criminal law, human rights, and civil judges make the correct decisions?”¹⁰⁵⁶ This statement implies that the “correct” decisions are those that are in accordance with U.S. views. The eighteen judges currently serving on the ICC were required to either:

- (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
- (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.¹⁰⁵⁷

¹⁰⁵³ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. *Cf.* Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005) (noting that the ICC will often have more available resources and targeted expertise than that found in most national governments, particularly those of developing countries, and thus successful prosecutions may be more likely under the ICC; therefore, governments now have an added tool to increase leverage on groups within their countries by initiating ICC proceedings).

¹⁰⁵⁴ Rome Statute, *supra* note 6, at Art. 17(1)(d).

¹⁰⁵⁵ *ICC Situations and Cases*, available at <http://www.icc-cpi.int/cases.html> (last visited Apr. 10, 2006) (noting that the Republic of Uganda, the Democratic Republic of Congo, and the Central African Republic have referred situations to the ICC, and that the UN Security Council has referred the situation in the Darfur region of the Sudan to the ICC).

¹⁰⁵⁶ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁵⁷ Rome Statute, *supra* note 6, at Art. 36(3)(b).

The ICC judges were nominated and elected by State parties to the Rome Statute,¹⁰⁵⁸ and appear to have a wealth of experience in international humanitarian law, international human rights law, international criminal law and public international law.¹⁰⁵⁹ Nine of the eighteen ICC judges have prior judicial experience (four on their country's highest court and six on either the ICTY or the ICTR), nine are former law professors, three are former ministers of government, two are former attorneys general, one is a former national vice president, and one is a former law school dean.¹⁰⁶⁰ The ICC judges appear to be at *least* as qualified as judges within the United States' federal judicial branch, the vast majority (if not all) of whom are political appointees.

b. Criminal Exposure of U.S. Service members

Besides the U.S.-centric concerns, another major fear has been exposing U.S. military service members to potential criminal liability for military related activities committed abroad, such as the detainee abuse at Abu Ghraib prison.¹⁰⁶¹ More specifically, the fear is that the principle of complementarity may be insufficient to protect U.S. service members from ICC jurisdiction.¹⁰⁶² However, "[t]he duty not to commit the crimes is not new; only the mechanism for enforcement is being added via the ICC."¹⁰⁶³

In addition to exposure for obvious war crimes, the United States is troubled by potential criminal liability where U.S. interpretations of the Law of War differ from

¹⁰⁵⁸ *Id.* at Art. 36(4)-(7).

¹⁰⁵⁹ ICC, *The Judges – Biographical Notes*, available at <http://www.icccpi.int/chambers/judges.html> (last visited Apr. 10, 2006).

¹⁰⁶⁰ *Id.*

¹⁰⁶¹ Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *See generally* Wikipedia, *Abu Ghraib Torture and Prisoner Abuse*, available at http://en.wikipedia.org/wiki/Abu_Ghraid_torture_and_prisoner_abuse (last visited Apr. 10, 2006) (discussing detainee abuse that occurred at Abu Ghraib prison in Iraq).

¹⁰⁶² ICC Fact Sheet, *supra* note 258. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *Accord* SECDEF ICC Statement, *supra* note 270.

¹⁰⁶³ Ferencz, *supra* note 71, at 233-234.

that of other countries. Although the general Law of War has fairly clear principles, “applications of the Law of Armed Conflict are mixed questions of fact and law, which are murky; for example, the 1999 NATO Intervention [in Kosovo, specifically regarding] ...choice of targets in an air war,” or shooting “technicals” in Somalia on sight, or when conducting a freedom of navigation operation in the Gulf of Sidra, firing back in response to being “painted with fire control radar.”¹⁰⁶⁴ Under the U.S. Rules of Engagement (ROE), responding to being “painted” with fire control radar is an act of self defense, whereas the British ROE require an actual attack before you can respond in self-defense.¹⁰⁶⁵ Professor Wedgwood suggests that perhaps the ICC would side with the United Kingdom’s view on self-defense.¹⁰⁶⁶

Ambassador Scheffer has two responses to this concern about the criminal exposure of U.S. service members due to conflicting interpretations of the Law of War: first, *ad hoc* tribunals have successfully dealt with the issue of conflicting ROE,¹⁰⁶⁷ and there is no indication that the ICC would not follow their lead; second, Title 18, the Crimes and Criminal Procedure section of the United States Code, “requires modernizing amendments to more accurately define prosecution for crimes against humanity, genocide, and a fuller definition of war crimes,” as well as “looking at the UCMJ [Uniform Code of Military Justice] regarding exposure symmetry.”¹⁰⁶⁸ The United States is significantly behind other countries in revising our law.¹⁰⁶⁹ If we take these steps, Ambassador Scheffer is confident that “complementarity would work.”¹⁰⁷⁰ A third response might be that one

¹⁰⁶⁴ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁶⁵ *Id.*

¹⁰⁶⁶ *Id.*

¹⁰⁶⁷ Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁶⁸ *Id.* See also Ferencz, *supra* note 71, at 233 (citing Chief Judge Everett on the Court of Appeals for the Armed Forces as “suggest[ing] that Federal Statutes could be amended to completely cover all the crimes under ICC jurisdiction”).

¹⁰⁶⁹ Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006. Other States have begun to revise their criminal laws, in order “to conform to their obligations as signatories to the ... ICC[] Statute; Belgium and Canada are among the nations that have already made such revisions.” Sriram, *supra* note 17, at 310.

¹⁰⁷⁰ Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

hundred States¹⁰⁷¹ have decided they are comfortable with the principle of complementarity, including many strong U.S. allies such as Australia, Canada, New Zealand, and the United Kingdom, which may indicate that the United States is “out of line” with the rest of the world on this issue.¹⁰⁷²

Besides differing interpretations of the Law of War, the United States is worried that its service members face greater potential criminal exposure for two reasons: first, “no other State regularly has 200,000 troops outside its borders”;¹⁰⁷³ second, that U.S. service members may be subjected to politically motivated prosecutions, despite the United States not being a party to the Rome Statute.¹⁰⁷⁴ In response to fears that U.S. troops engaged in UN peacekeeping efforts potentially would be subjected to ICC jurisdiction, the United States pressured¹⁰⁷⁵ the UN Security Council “to request the ICC Prosecutor to defer for one year (with the possibility of renewal) any investigation into crimes by members of UN operations who are nationals of states not party to the Rome Statute.”¹⁰⁷⁶

¹⁰⁷¹ The States Parties to the Rome Statute [hereinafter ICC State Parties], available at <http://www.icc-cpi.int/asp/statesparties.html> (last visited Apr. 10, 2006).

¹⁰⁷² Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005).

¹⁰⁷³ DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 609. Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁷⁴ ROBERTS & GUELFF, *supra* note 5, at 669. Accord SECDEF ICC Statement, *supra* note 270; U.S. ICC Policy, *supra* note 259; Sean D. Murphy & Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606, 610.

¹⁰⁷⁵ The “pressure” was in the form of vetoing a resolution that “extend[ed] the mandate of United Nations peacekeeping operations in Bosnia.” Ferencz, *supra* note 71, at 239; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 612.

¹⁰⁷⁶ S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 12, 2002); DUNOFF, RATNER & WIPPMAN, *supra* note 181, Updates, Chapter 9, available at <http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm> (last visited Apr. 10, 2006); Rome Statute, *supra* note 6, at Art. 16. The one-year deferral was renewed in 2003. S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003); DUNOFF, RATNER & WIPPMAN, *supra* note 181, Updates, Chapter 9, available at <http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm> (last visited Apr. 10, 2006). See *supra* notes 257, 267 and accompanying text. The U.S. tactic was seen as an act of defiance against the ICC, since the Rome Statute was due to enter into force the following day. Ferencz, *supra* note 71, at 239.

The greater exposure due to the sheer number of deployed U.S. service members could be mitigated by ensuring proper pre-deployment training on the Law of War, and enforcing the high moral standards of the U.S. military within the military justice system, which would then trigger the complementarity principle of the ICC.¹⁰⁷⁷ Moreover, as previously discussed, “no other Prosecutor in human history has been subjected to as many controls as exist in the ICC Statute.”¹⁰⁷⁸ In addition to those procedural controls previously discussed:

The ICC is under the complete control of the very many countries that form the Assembly of State Parties... They control the budget and can fire anyone who might be tempted to politicize the office... The ICC has no police force or other effective enforcement mechanism. The acceptance of its judgments depends upon the Court's reputation for integrity and competence. A frivolous Prosecutor could not remain in office. Politicization of the Court would amount to its suicide... It should be noted that early United States demands that only the Security Council could authorize prosecutions, were turned down by the others because they insisted upon an independent Prosecutor free of political influence.¹⁰⁷⁹

Another way to phrase this particular concern is arguing that exposing U.S. service members to criminal liability at the ICC for alleged war crimes committed abroad detracts from U.S. sovereignty because the United States is not a party to the Rome Statute.¹⁰⁸⁰ However, in the absence of the Rome Statute, U.S. service

¹⁰⁷⁷ See notes 242-47 and accompanying text. Ambassador Scheffer argues that the United States “has to be willing to submit to some risk [of criminal exposure for its service members] to ensure the ICC reviews courts-martial of other States’ military justice systems, which may not be as well managed.” Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁷⁸ Ferencz, *supra* note 71, at 231. See *supra* notes 248-58 and accompanying text. *Contra* Secretary of State Condoleezza Rice, ASIL 100th Mtg., *supra* note 27, “A Conversation with Secretary of State Condoleezza Rice,” Mar. 29, 2006.

¹⁰⁷⁹ Ferencz, *supra* note 71, at 232. See also *supra* note 251 and accompanying text (summarizing the Chief Prosecutor to the ICC’s carefully considered response to over 240 communications regarding alleged war crimes in Iraq).

¹⁰⁸⁰ ROBERTS & GUELFF, *supra* note 5, at 669. Accord SECDEF ICC Statement, *supra* note 270; ICC Fact Sheet, *supra* note 258; U.S. ICC Policy, *supra* note 259; Sean D. Murphy & Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606, 610.

members would still be criminally liable in foreign domestic courts for alleged war crimes committed abroad, under either the territoriality or universality principles.¹⁰⁸¹

Many treaties, such as hijacking or anti-terrorism conventions, provide for states other than state of nationality to exercise jurisdiction over persons accused of having committed serious crimes within their scope. These treaties, like the ICC treaty, do not require the state of nationality be a party to the treaty or consent to prosecution. The United States has in fact exercised jurisdiction over non-U.S. nationals in a number of cases on the basis of treaty provisions empowering it to do so. U.S. courts do not consider that the non-ratification of the relevant treaty by the suspect's state of nationality might somehow render overreaching or otherwise questionable the exercise of U.S. jurisdiction.¹⁰⁸²

Moreover, the lesson of the IMT at Nuremberg is that sovereignty cannot be used as a defense to war crimes.¹⁰⁸³

The United States is also concerned about potential criminal exposure under newly defined crimes (such as the crime of aggression).¹⁰⁸⁴ However, as previously noted, the earliest that definitions or elements of ICC crimes could be amended would be in the year 2009.¹⁰⁸⁵ Moreover, the crimes, as amended, would not apply to State parties who do not ratify the amendment.¹⁰⁸⁶ Thus, somewhat ironically, the United States would be more protected against any

¹⁰⁸¹ DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 611. *See supra* notes 11-21 and accompanying text. *Contra* Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006 (noting that the traditional architecture for Status of Forces Agreements (SOFAs) for NATO and UN Peacekeeping operations is that the sending State has responsibility for prosecuting war crimes, and the receiving State has responsibility for prosecuting off-duty crimes).

¹⁰⁸² DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 611.

¹⁰⁸³ Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.

¹⁰⁸⁴ Ferencz, *supra* note 71, at 233-34. *See supra* notes 239-41 and accompanying text.

¹⁰⁸⁵ *See supra* note 241 and accompanying text.

¹⁰⁸⁶ Rome Statute, *supra* note 6, at Arts. 5(2), 121, 123. *Accord* ROBERTS & GUELFF, *supra* note 5, at 670; ICC Fact Sheet, *supra* note 258.

amendments to the definitions of ICC crimes if it were to ratify the Rome Statute before 2009, since after that date, it would appear to be bound by the amended treaty.¹⁰⁸⁷ To the extent that the United States is concerned that its service members would be exposed to criminal liability for newly defined crimes in States that do ratify the amendments, or for crimes committed in States that have ratified the treaty but delayed its jurisdiction for seven years,¹⁰⁸⁸ this is the same sovereignty argument as previously addressed.¹⁰⁸⁹

c. Criminal Exposure of U.S. Civilian and Military Leaders

The United States' unease about how the ICC might define the crime of aggression goes beyond concern for its service members, and extends to trepidation about the "command responsibility" of U.S. civilian and military leadership.¹⁰⁹⁰ As previously noted, the crime of aggression was the most serious charge at the IMT in Nuremberg,¹⁰⁹¹ and if it is defined by the State parties to the Rome Statute,¹⁰⁹² *de facto* "State-to-State" complaints would be

¹⁰⁸⁷ The Rome Statute itself is silent on whether States that ratify the treaty after it has been amended are bound by the amendments. *See generally* Rome Statute, *supra* note 6, at Arts. 121-23, 125. However, the Vienna Convention on the Law of Treaties (VCLT) is fairly clear that "[a]ny State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State... be considered as a party to the treaty as amended." VCLT, *supra* note 230, at Art. 40(5). Since no reservations to the Rome Statute may be made (Art. 120), it would appear that the United States would be bound to accept any amendments to the Rome Statute if it ratified the treaty afterwards. Again, although the United States is not a party to the VCLT, it considers the VCLT to represent customary international law. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *See supra* note 230.

¹⁰⁸⁸ *See supra* note 234 and accompanying text.

¹⁰⁸⁹ ROBERTS & GUELF, *supra* note 5, at 670. *See supra* notes 307-310 and accompanying text.

¹⁰⁹⁰ ICC Fact Sheet, *supra* note 258. *Accord* Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006; SECDEF ICC Statement, *supra* note 270. *See also* Benjamin B. Ferencz, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005 (noting that "perhaps the U.S. has reason to worry about the ICC shining the 'crime of aggression' spotlight on the U.S. in Iraq II, the U.S. jumped the gun, which was the supreme crime of aggression"); ASIL 100th Mtg., *supra* note 27, Resolution, Mar. 30, 2006 (stating seven foundational concepts of international law, including "[i]n some circumstances, commanders (both military and civilian) are personally responsible under international law for the acts of their subordinates). *Cf.* Philippe Sands, "Lawless World" Presentation, Oct. 25, 2005 (arguing that the U.S. removal of Saddam Hussein was "done in a bad way" [i.e. without UN Security Council approval], and that by March 2003, "there was no longer a good reason to get rid of Saddam"). Ironically, "Saddam's trial will be the first prosecution for the crime of aggression since Nuremberg." Michael Scharf, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005. *Accord* Henry T. King, Jr., Remarks at 3, *Id.*

¹⁰⁹¹ *See supra* note 241 and accompanying text.

¹⁰⁹² *See supra* notes 241, 311 and accompanying text.

permitted.¹⁰⁹³ High-ranking civilian and military leaders would not be able to shield themselves from criminal liability beneath the banner of “head of State immunity,” because the Rome Statute, as the Statute of the IMT before it, considers official capacity to be irrelevant.¹⁰⁹⁴

Ambassador Scheffer agrees that:

The United States should be most worried about the definition of the crime of aggression and should want U.S. input regarding referral [of the crime of aggression] to the ICC, and how the crime of aggression is defined for individual criminal responsibility, instead of taking the position of total resistance to the ICC and having a policy of denial.¹⁰⁹⁵

Rather than continue in our “policy of fear,” Ambassador Scheffer argues that the United States should exercise its heretofore unexercised right to be present as an observer at the Assembly of States Parties to the Rome Statute.¹⁰⁹⁶

¹⁰⁹³ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. Although technically only *individuals* are subject to the ICC’s jurisdiction, a State party could refer another State’s Secretary of War or Head of State to the ICC Prosecutor for investigation based on the alleged crime of aggression. This would be a *de facto* State-to-State complaint.

¹⁰⁹⁴ Rome Statute, *supra* note 6, at Art. 27. Official immunity and “merely following orders” were also rejected as defenses at the IMT in Nuremberg. *See* Report of Justice Jackson to President Truman, June 6, 1945, available at <http://www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm> (last visited Mar. 26, 2006):

With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility.

Accord Sriram, *supra* note 17, at 316 (2003).

¹⁰⁹⁵ Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹⁰⁹⁶ *Id.*; Rome Statute, *supra* note 6, at Art. 112(1); U.S. ICC Policy, *supra* note 259. *See also* Philippe Sands, “*Lawless World*” Presentation, Oct. 25, 2005 (noting the “climate of fear” within the current U.S. administration); Judge Buerghenthal, Mar. 28, 2006 (noting that both the ICC and the United States would benefit from U.S. participation). *See supra* note 230 and accompanying text.

d. Efficiency

The final U.S. objection to the ICC is also made about the two *ad hoc* tribunals: lack of efficiency.¹⁰⁹⁷ With an estimated total annual budget of \$150 million,¹⁰⁹⁸ and approximately 475 staff members¹⁰⁹⁹ in addition to the eighteen sitting judges,¹¹⁰⁰ the ICC has achieved the following progress in approximately three years of operations:¹¹⁰¹ the initiation of three investigations into four situations,¹¹⁰² and the recent indictment and arrest of the ICC's first criminal defendant,¹¹⁰³ "Mr. Thomas Lubanga Dyilo, a Congolese national and alleged founder and leader of the Union des Patriotes Congolais (UPC),"¹¹⁰⁴ a militia that conscripted child soldiers in the Ituri region of the Democratic Republic of the Congo.¹¹⁰⁵ Of course, the depth and breadth of the ICC investigations is belied by these simple statistics.¹¹⁰⁶

¹⁰⁹⁷ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. *See supra* note 211 and accompanying text.

¹⁰⁹⁸ Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005).

¹⁰⁹⁹ ICC Newsletter, *Latest Recruitment Figures*, Nov. 2005, available at http://www.iccpi.int/library/about/newsletter/index_30.html (last visited Apr. 10, 2006).

¹¹⁰⁰ ICC, *The Judges – Biographical Notes*, *supra* note 286.

¹¹⁰¹ ICC, *Historical Introduction*, available at <http://www.iccpi.int/about/ata glance/history.html> (last visited Apr. 10, 2006).

¹¹⁰² ICC, *Report on the Activities of the Court*, Sep. 16, 2005, available at http://www.iccpi.int/library/asp/ICC-ASP-4-16_English.pdf (last visited Apr. 10, 2006). *Accord* ICC *Situations and Cases*, *supra* note 282.

¹¹⁰³ The ICC had previously issued arrest warrants against five other defendants involved in the Uganda situation. D.R. Congo: ICC Arrest First Step to Justice, available at <http://hrw.org/english/docs/2006/03/17/congo13026.htm> (last visited Apr. 10, 2006) (noting that "On October 14, 2005, the court unsealed its first arrest warrants, for Joseph Kony, Vincent Otti and three other officers of the Lord's Resistance Army (LRA) in Uganda. To date they have not been apprehended.").

¹¹⁰⁴ *First Arrest for the International Criminal Court*, Mar. 17, 2006, available at <http://www.iccpi.int/press/pressreleases/132.html> (last visited Apr. 10, 2006). *Accord* D.R. Congo: ICC Arrest First Step to Justice, available at <http://hrw.org/english/docs/2006/03/17/congo13026.htm> (last visited Apr. 10, 2006).

¹¹⁰⁵ *Statement by ICC Chief Prosecutor Luis Moreno-Ocampo*, available at http://www.iccpi.int/library/organs/otp/speeches/LMO_20060318_En.pdf (last visited Apr. 10, 2006). *Accord* D.R. Congo: ICC Arrest First Step to Justice, available at <http://hrw.org/english/docs/2006/03/17/congo13026.htm> (last visited Apr. 10, 2006).

¹¹⁰⁶ *Statement by ICC Chief Prosecutor Luis Moreno-Ocampo*, *supra* note 332, at 2 (noting that "[s]ince the Court's jurisdiction began in July 2002, 8,000 people were killed in the [Ituri] region, and 600,000 people displaced."). *Accord* D.R. Congo: ICC Arrest First Step to Justice, available at

The U.S. concerns about the ICC appear related to its general distrust of international organizations, and international courts in particular. As Judge Buergenthal, the American judge on the International Court of Justice, recently remarked, the United States has very little experience dealing with international courts compared to European States, and thus is more critical of international courts.¹¹⁰⁷ However, Ambassador Scheffer points out that:

the ICC was initially a force protection objective of the U.S., to hold militaries accountable to the Law of War. The dominant issue during the ICC negotiations was not the potential U.S. liability, but “atrocities lords” who seek to massacre people. We cannot be obsessed with U.S. concerns and overlook the fundamental purpose of the ICC, which was [addressing] war atrocities.¹¹⁰⁸

9.3. U.S. Opposition to the ICC

Besides raising a number of concerns, the United States has *actively opposed* the ICC in a variety of ways. As previously discussed, the United States “unsigned” the Rome Statute,¹¹⁰⁹ and pressured the UN Security Council to request one year deferrals from the ICC Prosecutor before he investigates any crimes allegedly committed by members of UN peacekeeping operations who are nationals of States not party to the Rome Statute.¹¹¹⁰ The United States also cut off any funding or other support of the ICC,¹¹¹¹ and introduced legislation “to prohibit and penalize any cooperation with the ICC.”¹¹¹²

<http://hrw.org/english/docs/2006/03/17/congo13026.htm> (last visited Apr. 10, 2006) (noting that the violence in the Ituri region is part of a broader conflict in the Great Lakes region).

¹¹⁰⁷ Judge Thomas Buergenthal, Cummings Symposium, *supra* note 39, Sep. 30, 2005.

¹¹⁰⁸ Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹¹⁰⁹ See *supra* note 230 and accompanying text.

¹¹¹⁰ See *supra* note 303 and accompanying text.

¹¹¹¹ Ferencz, *supra* note 71, at 236, 239.

¹¹¹² *Id.* at 236.

In addition, the United States launched “[a] worldwide campaign... to obtain bilateral agreements to block all assistance to the ICC and guarantee that no Americans would ever be handed over to the international court.”¹¹¹³ Ambassador Bolton collected these bilateral agreements¹¹¹⁴ pursuant to Article 98 of the Rome Statute, which prevents the ICC from requesting a State party to surrender an accused if doing so would require it to act inconsistently with other international obligations it might have with regard to a third State.¹¹¹⁵ Under these “Article 98 agreements” as written, the U.S. President may waive their prohibition against cooperating with the ICC with respect to a particular named defendant for renewable one-year periods.¹¹¹⁶ To date, the United States has entered into one hundred Article 98 agreements with other States; thus there are now as many Article 98 agreements as there are State parties to the Rome Statute.¹¹¹⁷

Article 98 agreements are offensive to other States, particularly to European States, for at least three reasons. First, they are written expansively in overbroad¹¹¹⁸ terms to include not only U.S. service members deployed overseas and engaged in official duties, but also “current or former officials, employees

¹¹¹³ *Id.*

¹¹¹⁴ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. *Accord* Ferencz, *supra* note 71, at 240.

¹¹¹⁵ Rome Statute, *supra* note 6, at Art. 98. Article 98 had been inserted into the Rome Statute at United States insistence, in order to respect pre-existing treaty obligations known as Status of Forces Agreements (SOFAs), which “require[] American soldiers arrested for crimes committed on foreign soil to be surrendered to the United States for trial rather than being tried under the local national laws.” Ferencz, *supra* note 71, at 240. *See generally* *Status-of-Forces-Agreements (SOFA)*, available at <http://www.globalsecurity.org/military/facility/sofa.htm> (last visited Apr. 10, 2006) (explaining SOFAs). Arguably, these Article 98 agreements are perceived as contrary to the spirit and intent of the Rome Statute, if not the letter. Ferencz, *supra* note 71, at 231, 240. *Contra* Bureau of Political-Military Affairs, U.S. Department of State, *Fact Sheet, Frequently Asked Questions About the U.S. Government's Policy Regarding the International Criminal Court (ICC)* [hereinafter ICC FAQs], July 30, 2003, available at <http://www.state.gov/t/pm/rls/fs/23428.htm> (last visited Apr. 10, 2006).

¹¹¹⁶ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹¹¹⁷ *Compare Press Statement*, Richard Boucher, Spokesman, *U.S. Signs 100th Article 98 Agreement*, May 3, 2005, available at <http://www.state.gov/r/pa/prs/ps/2005/45573.htm> (last visited Apr. 10, 2006) with ICC State Parties, *supra* note 298.

¹¹¹⁸ ASIL President-elect Jose Alvarez, ASIL 100th Mtg., *supra* note 27, “A Conversation with Secretary of State Condoleezza Rice,” Mar. 29, 2006.

(including contractors), military personnel and all other U.S. nationals”¹¹¹⁹ acting even in their private capacities.¹¹²⁰ Second, the Article 98 agreements serve as a kind of U.S.-created loophole or double standard because the United States appears to have one standard for foreigners, and a higher one for U.S. citizens.¹¹²¹ The United States is willing to send suspected foreign war criminals to the *ad hoc* and other international tribunals, including the ICC,¹¹²² but not Americans.¹¹²³ This argument that Americans are somehow above international law is what Europeans find particularly offensive.¹¹²⁴ Third and finally, the fact that the United States has openly expressed its opposition to the ICC, and is willing to pull the levers of economic and military assistance to enforce its will, illustrates that the United States is using its clout to influence other States’ behavior.¹¹²⁵ The European Union grudgingly agreed on a set of “Guiding Principles” whereby its member-States could enter into these Article 98 agreements, so long as: (1) they only applied to nationals of non-parties to the Rome Statute, (2) they only applied to persons sent by the United States on official business, and (3) the United States agreed to conduct *bona fide* investigations of crimes committed by Americans that would otherwise fall under ICC jurisdiction.¹¹²⁶

¹¹¹⁹ DUNOFF, RATNER & WIPPMAN, *supra* note 181, Updates, Chapter 9, available at <http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm> (last visited Apr. 10, 2006). Accord Philippe Sands, “*Lawless World*” Presentation, Oct. 25, 2005.

¹¹²⁰ Philippe Sands, “*Lawless World*” Presentation, Oct. 25, 2005. Accord ICC FAQs, *supra* note 342; Sean D. Murphy, “*Lawless World*” Presentation, Oct. 25, 2005; Ferencz, *supra* note 71, at 246.

¹¹²¹ Philippe Sands, “*Lawless World*” Presentation, Oct. 25, 2005. Accord Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005). Cf. Ferencz, *supra* note 71, at 231 (“Those who oppose the ICC insist upon absolute guarantees in advance that no United States nationals will ever come under its jurisdiction”). Contra ICC FAQs, *supra* note 342.

¹¹²² See *supra* note 238 and accompanying text.

¹¹²³ Philippe Sands, “*Lawless World*” Presentation, Oct. 25, 2005.

¹¹²⁴ *Id.* ICJ President Judge Rosalyn Higgins, ASIL 100th Mtg., *supra* note 27, “A Conversation with Secretary of State Condoleezza Rice,” Mar. 29, 2006. Contra ICC FAQs, *supra* note 342.

¹¹²⁵ Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005); ASIL President-elect Jose Alvarez, ASIL 100th Mtg., *supra* note 27, “A Conversation with Secretary of State Condoleezza Rice,” Mar. 29, 2006.

¹¹²⁶ DUNOFF, RATNER & WIPPMAN, *supra* note 181, Updates, Chapter 9, available at <http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm> (last visited Apr. 10, 2006).

The final significant move by the United States in opposition to the ICC was enacting the “American Service members Protection Act (ASPA) of 2002,” otherwise known as “The Hague Invasion Act.”¹¹²⁷ The ASPA essentially serves as an umbrella framework for opposition to the ICC, combining:

- (1) cutting off all U.S. cooperation to the ICC (no funding, court assistance, assistance with investigations, etc.);
- (2) barring U.S. military assistance and economic support to ratifying States unless they are either
 - a. a fellow NATO member;
 - b. the President waives the prohibition; or
 - c. if the State signs an Article 98 bilateral agreement not to surrender U.S. citizens¹¹²⁸
- (3) the United States refuses to provide UN peacekeepers unless there is an assurance of no potential liability for U.S. military
- (4) the President may use all means necessary to free any U.S. person detained by the ICC (hence the nickname “Hague Invasion Act”).¹¹²⁹

The ASPA was “meant to emphasize how serious the United States was... about no third party liability.”¹¹³⁰

¹¹²⁷ U.S. ICC Policy, *supra* note 259; Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. *Accord* Ferencz, *supra* note 71, at 236. Apparently President Clinton had opposed the ASPA and “headed it off” twice before. Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹¹²⁸ See *supra* notes 340-53 and accompanying text.

¹¹²⁹ American Service members' Protection Act of 2002, 22 USCS §§ 7401 *et seq.* (2006), available at <http://www.state.gov/t/pm/rls/othr/misc/23425.htm> (last visited Apr. 10, 2006). See also Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹¹³⁰ Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

Although U.S. opposition to the ICC was not unexpected after the numerous concerns it raised, “no one anticipated the vehemence of [U.S.] efforts to abort the court or cripple it in its cradle.”¹¹³¹ The irony of U.S. opposition to the ICC is readily apparent:

It is indeed ironic that the United States, which led the world in creating the Nuremberg principles, is now fighting so vehemently against the International Criminal Court which would institutionalize those principles, whereas Germany, whose leaders were the target of Nuremberg, is in the forefront of the fight to sustain the Nuremberg principles in today’s world.¹¹³²

Although Professor Dinstein argues that the “[p]rospects of [the ICC’s] success are still a matter of conjecture,”¹¹³³ Ambassador Scheffer argues that it is time for the United States to accept the existence of the ICC and stop opposing it, because the ICC is “here to stay.”¹¹³⁴ As he so succinctly put it, “the ICC is here to stay-get over it, get used to it, and get on with it.”¹¹³⁵ Instead, Ambassador Scheffer argues that the United States needs to remain engaged in order to affect how the ICC is implemented, and to assist in managing the future cases and situations referred to it.¹¹³⁶

One final comment with regard to the ICC: it is important to remember the big picture, that the target of the ICC is not the United States, with its established domestic and military justice systems that are largely effective in punishing the occasional war criminal. Instead, the ICC is focused on the “‘atrocious lords’ who seek to massacre people [by the thousands]. We cannot be obsessed with U.S.

¹¹³¹ Ferencz, *supra* note 71, at 229.

¹¹³² Henry T. King, Jr., Remarks at 4, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005. *Accord id.* at p. 5 (providing that the “Nuremberg principles... are good principles and they must guide our behavior by adherence to them – with no country exemptions (including the U.S.)”).

¹¹³³ DINSTEIN, *supra* note 2, at 229.

¹¹³⁴ Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹¹³⁵ Ambassador David Scheffer, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.

¹¹³⁶ Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

concerns and overlook the fundamental purpose of the ICC, which was war atrocities.”¹¹³⁷

Since genocide, crimes against humanity and major war crimes are almost invariably committed with the connivance and support of a government, the absence of any international tribunal will almost surely mean that, unless the guilty regime is overthrown, the perpetrators will never be tried.... the time has come for such impunity to end....a country torn by civil strife will lack the political will or legal institutions needed to try wrongdoers. If tyrants are able to evade justice, their victims will seek vengeance and take the law into their own hands. Thus, there can be no justice without peace and no peace without justice.¹¹³⁸

9.4 CURRENT STATUS OF UNIVERSAL JURISDICTION OVER WAR CRIMES

In order to assess the current status of universal jurisdiction over war crimes, let us assume the following hypothetical¹¹³⁹: an uncooperative Afghan detainee is being held by U.S. personnel at the American military base in Bagram, Afghanistan in December 2005.¹¹⁴⁰ The American personnel strip the detainee of his clothing, strike him repeatedly with their rifle butts on his torso and legs, drag him around on the cold, damp floor of his cell, chain him to the concrete floor, and leave him there overnight in an unheated cell without any blankets-by the

¹¹³⁷ Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006. *See also* note 335 and accompanying text.

¹¹³⁸ Ferencz, *supra* note 71, at 230.

¹¹³⁹ This incident is truly intended as a hypothetical, although certain facts have been borrowed from earlier allegations of detainee abuse. *See, e.g.*, U.S. Army News Release, *Fact Sheet* [hereinafter *Army Fact Sheet*], March 3, 2005, available at http://www4.army.mil/OCPA/read.php?story_id_key=6955 (last visited Apr. 10, 2006); Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, available at <http://www.nytimes.com/2005/05/22/international/asia/22abuse.html?ex=1274414400&en=35951e72c65a2185&ei=5088&partner=rssnyt&emc=rss> (last visited Apr. 10, 2006); Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, WASH. POST, March 3, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A2576-2005Mar2.html> (last visited Apr. 10, 2006); Shafiq Rasul, The George Wash. Univ. Law Sch. Symposium: Voices of Guantanamo, Mar. 20, 2006.

¹¹⁴⁰ It is important to note that Afghanistan acceded to the Rome Statute on February 10, 2003. ICC State Parties, *supra* note 298 (follow “Afghanistan” hyperlink).

next morning the Afghan detainee has died of hypothermia. Assuming the Geneva Conventions apply to U.S. forces present in Afghanistan in 2005,¹¹⁴¹ this would appear to be a relatively clear case of a “grave breach” of the “Geneva Convention Relative to the Treatment of Prisoners of War, of 12 August 1949” (Third Geneva Convention),¹¹⁴² and thus constitute a war crime.¹¹⁴³ We will use this hypothetical to review the current status of universal jurisdiction vis-à-vis the other relevant traditional jurisdictional bases.

¹¹⁴¹ Common Article 2 of the Geneva Conventions provides that the Convention applies in international armed conflict, and “to all cases of partial or total occupation.” See, e.g., Geneva Convention III, *supra* note 157, at Art. 2. Even if the continued U.S. involvement in Afghanistan does not rise to the level of “partial occupation,” Common Article 3 of the Geneva Conventions extends the following minimum level of protection to non-international armed conflicts:

Persons taking no active part in the hostilities, including . . . those placed hors de combat by . . . detention . . . shall in all circumstances be treated humanely To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.

See, e.g., Geneva Convention III, *supra* note 157, at Art. 3. The U.S. administration has admitted that the Geneva Conventions applied to Taliban forces fighting in the conflict in Afghanistan, although not to al Qaeda forces. Office of the Press Secretary, The White House, *Fact Sheet: Status of Detainees at Guantanamo*, (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (last visited Apr. 10, 2006); Secretary of State Condoleezza Rice, ASIL 100th Mtg., *supra* note 27, “A Conversation with Secretary of State Condoleezza Rice,” Mar. 29, 2006. Further consideration of this issue is beyond the scope of this article. Compare William H. Taft, *Symposium: The Geneva Conventions and the Rules of War in the Post-9/11 and Iraq World: Keynote Address*, 21 AM. U. INT’L L. REV. 149 (2005) (arguing that the Geneva Conventions do not apply) with Evan J. Wallach, *War Crimes Research Symposium: “Terrorism on Trial”: The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 37 CASE W. RES. J. INT’L L. 541 (2005) (arguing that the Geneva Conventions do apply). See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 549-50 (2004) (Souter, J., concurring in part and dissenting in part) (suggesting that the United States Government may be violating Article 5 of the Third Geneva Convention by not treating captives as prisoners of war until their status has been determined by a competent tribunal).

¹¹⁴² Article 130 of the Third Geneva Convention defines grave breaches to include “torture or inhuman treatment.... wilfully causing great suffering or serious injury to body or health” to a “protected person.” Geneva Convention III, *supra* note 157, at Art. 130.

¹¹⁴³ Is every violation of the Law of War a war crime, or only serious violations? Compare U.S. Dep’t of Army, Field Manual 27-10, *The Law of Land Warfare* para. 499 (1956) (“Every violation of the law of war is a war crime.”) with Yoram Dinstein, *The Universality Principle and War Crimes*, in 71 International Law Studies, *The Law of Armed Conflict: Into The Next Millennium*, 17, 21 (Michael Schmitt & Leslie Green, eds., 1998) (State practice only supports serious violations of the Law of War, such as the grave breaches of the Geneva Conventions, as constituting war crimes, and not mere technical violations). Accord DINSTEIN, *supra* note 2, at 229.

A. Nationality Jurisdiction

Where “all States are empowered to try and punish war criminals,” the nationality of the perpetrator is a sufficient “linkage” to establish jurisdiction over the alleged war criminal.¹¹⁴⁴ This is true as a matter of “customary international law, [where] nations have almost unlimited authority to regulate the conduct of their own nationals around the world.”¹¹⁴⁵ Thus, in general terms, the United States would have jurisdiction to enforce its national laws against the American personnel who abused the detainee in the above hypothetical. Moreover, the U.S. jurisdiction arguably would be predominant or “[i]n the first instance.”¹¹⁴⁶ More specifically, the Geneva Conventions obligate “High Contracting Parties” to criminalize grave breaches of the Conventions.¹¹⁴⁷ Having ratified the four Geneva Conventions,¹¹⁴⁸ the United States fulfilled its commitment to criminalize “grave breaches” by enacting the War Crimes Act.¹¹⁴⁹ The War Crimes Act covers grave breaches of the four 1949 Geneva Conventions,¹¹⁵⁰ as well as violations of Common Article 3.¹¹⁵¹ It would appear that the United States could charge any American *civilians* involved in the detainee abuse hypothetical with having committed a war crime in violation of the War Crimes Act.

In addition, the United States could charge any American *service members* involved in the detainee abuse hypothetical with having committed various

¹¹⁴⁴ *Id.* at 236.

¹¹⁴⁵ BRADLEY & GOLDSMITH, *supra* note 10, at 535. *See supra* note 12.

¹¹⁴⁶ *ILC 1996 Draft Code*, *supra* note 5, at Commentary para. 1 to Art. 9.

¹¹⁴⁷ *See, e.g.*, Geneva Convention III, *supra* note 157, at Art. 129.

¹¹⁴⁸ The United States ratified all four Geneva Conventions on August 2, 1955. ROBERTS & GUELFF, *supra* note 5, at 361, 368.

¹¹⁴⁹ 18 USC § 2441 (2006).

¹¹⁵⁰ 18 USC § 2441(c)(1) (2006).

¹¹⁵¹ 18 USC § 2441(c)(3) (2006).

crimes under the Uniform Code of Military Justice.¹¹⁵² Specifically, any American service members involved in the detainee abuse hypothetical above could be charged with conspiracy,¹¹⁵³ failure to follow orders,¹¹⁵⁴ dereliction of duty,¹¹⁵⁵ cruelty and maltreatment,¹¹⁵⁶ murder,¹¹⁵⁷ manslaughter,¹¹⁵⁸ assault,¹¹⁵⁹ and “conduct of a nature to bring discredit upon the armed forces.”¹¹⁶⁰ While these various crimes would not carry the moniker of “war crimes,” they would collectively carry a maximum punishment of life imprisonment, total forfeitures of all pay and allowances, and a Dishonorable Discharge from the military.¹¹⁶¹ Thus, the United States could effectively establish traditional nationality enforcement jurisdiction over any Americans involved with the detainee abuse hypothetical above, be they civilians or military service members.¹¹⁶²

¹¹⁵² 10 USC §§ 801 *et seq.* (2006)

¹¹⁵³ *Id.* § 881.

¹¹⁵⁴ *Id.* §892(1).

¹¹⁵⁵ *Id.* §892(3).

¹¹⁵⁶ *Id.* at §893.

¹¹⁵⁷ *Id.* at § 918(3).

¹¹⁵⁸ *Id.* at §919(b).

¹¹⁵⁹ *Id.* at §928.

¹¹⁶⁰ *Id.* at §934.

¹¹⁶¹ Appendix 12, MANUAL FOR COURTS-MARTIAL (2005). The charge of murder by being “engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life” alone may be punished by life imprisonment. 10 USC § 918(3) (2006); Uniform Code of Military Justice Art. 118(3), MANUAL FOR COURTS-MARTIAL (2005). Even without a conviction on the murder charge, the remaining charges carry a maximum punishment of over thirty years of confinement. *Id.*

¹¹⁶² In addition to the War Crimes Act and the Uniform Code of Military Justice, the Military Extraterritorial Jurisdiction Act (MEJA) provides jurisdiction over anyone “employed by or accompanying the Armed Forces outside the United States,” or for members of the Armed Forces after they have left active duty for crimes committed abroad while they were on active duty. 18 USC §§ 3261 *et seq.* (2006). See generally Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad – A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U.L. REV. 55 (2001).

B. Territoriality and Passive Personality Jurisdiction

Just as the nationality of the perpetrator is a sufficient “linkage” to establish jurisdiction over an alleged war criminal,¹¹⁶³ so too is the fact that the war crime was committed within a State’s territory.¹¹⁶⁴ Territoriality is perhaps the most widely accepted basis for jurisdiction.¹¹⁶⁵ Just as the United States has extended jurisdiction over crimes committed within its territory,¹¹⁶⁶ so too may Afghanistan extend jurisdiction over crimes committed within its territory, such as the detainee abuse hypothetical.¹¹⁶⁷

Under the “passive personality” form of jurisdiction,¹¹⁶⁸ the United States extends jurisdiction over war crimes committed against U.S. *victims* pursuant to the War Crimes Act.¹¹⁶⁹ Afghanistan would likewise be legally justified in extending jurisdiction over perpetrators of war crimes against Afghan nationals. Nationality of the victim is therefore a sufficient linkage to establish jurisdiction.¹¹⁷⁰ Thus, Afghanistan would be justified in extending its jurisdiction over the Americans involved with the detainee abuse hypothetical, under either the territoriality or passive personality principles.

One complicating factor for the exercise of either territoriality or passive personality jurisdiction by Afghanistan over the Americans involved with the detainee abuse hypothetical above, would be the presence of a Status of Forces Agreement (SOFA) between Afghanistan and the United States, whereby

¹¹⁶³ See *supra* note 371 and accompanying text.

¹¹⁶⁴ DINSTEIN, *supra* note 2, at 236.

¹¹⁶⁵ See *supra* note 11 and accompanying text.

¹¹⁶⁶ See, e.g., 18 USC § 7 (2006) (defining the “special maritime and territorial jurisdiction of the United States”).

¹¹⁶⁷ See *supra* notes 366-70 and accompanying text.

¹¹⁶⁸ See *supra* note 14 and accompanying text.

¹¹⁶⁹ 18 USC § 2441(b) (2006).

¹¹⁷⁰ DINSTEIN, *supra* note 2, at 236.

Afghanistan may have agreed to limit its otherwise legitimate jurisdiction over U.S. personnel.¹¹⁷¹ As far as is publicly known, there is no SOFA between Afghanistan and the United States.¹¹⁷² However, even in the absence of a SOFA, any Afghan attempt to exercise jurisdiction over the Americans involved with the hypothetical would depend on a number of factors, including: whether Afghanistan had physical custody over the Americans involved, existing diplomatic relations between Afghanistan and the United States, diplomatic pressures brought to bear between Afghanistan and the United States, and whether the United Nations Security Council decided to intervene.¹¹⁷³

C. Universal Jurisdiction

Despite the proliferation of international tribunals, domestic prosecutions are still possible for certain universal crimes, including war crimes.¹¹⁷⁴ As mentioned earlier, a few States have either exercised, or sought to exercise, universal jurisdiction over crimes committed abroad, either as a matter of customary international law or pursuant to domestic statutes.¹¹⁷⁵ One commentator has categorized three distinct approaches taken by States with regard to universal jurisdiction: “pure universal jurisdiction,” “universal jurisdiction plus,” and “non-use.”¹¹⁷⁶

¹¹⁷¹ There are apparently 110 permanent SOFAs between the United States and other nations. Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005).

¹¹⁷² Anthony Dworkin, *Not Above the Law: U.S. Special Operations in the War on Terror*, Crimes of War Project, September 20, 2004, available at <http://www.crimesofwar.org/special/afghan/notabovethelaw.html> (last visited Apr. 10, 2006). *Contra* Draft Plaintiffs’ complaint, *Idema et al. v. Afghanistan*, No. _____ (S.D.N.Y. 2005), available at <http://www.superpatriots.us/aboutthecase/karzaisuit.htm> (last visited Apr. 10, 2006) (conjecturing that a classified SOFA exists between the United States and Afghanistan).

¹¹⁷³ See, e.g., DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 911-23 (UN Security Council intervening in trial of the alleged skyjackers involved in the *Lockerbie* case. *Accord* S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992); S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992); Case Concerning Questions of Interpretation and Application of the 1971 Montréal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. Rep. 114 (Apr. 14).

¹¹⁷⁴ DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 611.

¹¹⁷⁵ See *supra* notes 152-75 and accompanying text.

¹¹⁷⁶ Sriram, *supra* note 17, at 358-67.

“Pure universal jurisdiction” is evidenced when a court does not feel the need to rely on any additional *domestic* legislation in order to establish jurisdiction over an international criminal, such as an alleged war criminal.¹¹⁷⁷ The exercise of universal jurisdiction, even in its purest form, does not detract from other States’ sovereignty, since “recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity.”¹¹⁷⁸ The State exercising such pure universal jurisdiction over war crimes need not bear any relation to the conflict itself, and could even be a neutral State.¹¹⁷⁹ Nevertheless, “[t]hese [pure] cases represent the boldest use of universal jurisdiction,” and thus, not too surprisingly, are relatively rare.¹¹⁸⁰

The second approach, “universal jurisdiction plus,” links universal jurisdiction with more traditional bases of jurisdiction: “Judges in national courts have usually been more comfortable combining what is to them a novel basis for jurisdiction with more familiar bases like those linked to a state’s territory or interests.”¹¹⁸¹ However, even Belgian law requires “that a suspect be physically present in Belgium in order to be investigated and tried.”¹¹⁸² So if a State like Belgium, which has domestic legislation supporting the exercise of universal jurisdiction, were to gain physical custody over any of the Americans involved with the detainee abuse hypothetical,¹¹⁸³ that State could exercise “universal jurisdiction plus” over the alleged grave breaches of the Geneva Conventions.¹¹⁸⁴

¹¹⁷⁷ Sriram, *supra* note 17, at 310, 359-60.

¹¹⁷⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part and concurring in the judgment).

¹¹⁷⁹ DINSTEIN, *supra* note 2, at 236.

¹¹⁸⁰ *Id.*

¹¹⁸¹ Sriram, *supra* note 17, at 310. *See generally id.* at 360-66. *See also* Barrett, *supra* note 159, at 470.

¹¹⁸² BRADLEY & GOLDSMITH, *supra* note 10, at 537. *See supra* note 166 and accompanying text.

¹¹⁸³ *See supra* notes 366-70 and accompanying text.

¹¹⁸⁴ *See supra* notes 371-72 and accompanying text.

The third and more common approach is the “non-use” of universal jurisdiction altogether, in the absence of domestic legislation supporting its exercise.¹¹⁸⁵ Thus, the courts in most States would rather rely on traditional bases for jurisdiction, such as nationality and passive personality,¹¹⁸⁶ than rely exclusively on universal jurisdiction.¹¹⁸⁷

D. ICC Complementarity

Under the principle of “complementarity,”¹¹⁸⁸ the International Criminal Court (ICC) would first give “precedence to national courts”¹¹⁸⁹ exercising one of the five principle jurisdictional bases.¹¹⁹⁰ Thus, for the detainee abuse hypothetical¹¹⁹¹: the State of *nationality* of the accused (United States), the State in whose *territory* the incident occurred (Afghanistan), the State of nationality of the victim, a.k.a. “*passive personality*” (Afghanistan), or some other State under the principle of *universality* (e.g. Belgium) would all have precedence before the ICC would consider prosecution.¹¹⁹² Only if these States were “unwilling or unable genuinely to carry out the investigation or prosecution”¹¹⁹³ would the case be admissible before the ICC.¹¹⁹⁴

¹¹⁸⁵ Sriram, *supra* note 17, at 311.

¹¹⁸⁶ *See supra* parts III.A & III.B.

¹¹⁸⁷ *See generally* Sriram, *supra* note 17, at 366-67; Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM.J. INT'L L. 316, 330 (Apr. 1999).

¹¹⁸⁸ Rome Statute, *supra* note 6, at Arts. 1, 17.

¹¹⁸⁹ ROBERTS & GUELFF, *supra* note 5, at 669, 672.

¹¹⁹⁰ *See supra* notes 10-21.

¹¹⁹¹ *See supra* notes 366-70 and accompanying text.

¹¹⁹² The remaining jurisdictional basis, “protective principle,” would not seem to apply to this detainee abuse hypothetical, because the detainee abuse is neither directed against the security of the State, nor does it threaten the integrity of governmental functions. *See supra* note 13.

¹¹⁹³ Rome Statute, *supra* note 6, at Art. 17(1)(a).

¹¹⁹⁴ *Id.* at Art. 17; ROBERTS & GUELFF, *supra* note 5, at 669.

More specifically, the ICC Prosecutor:

is required to consider three factors. First, [he] must consider whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the [ICC] has been . . . committed. . . . [Second, he] must then consider admissibility before the [ICC], in light of the requirements relating to gravity and complementarity with national proceedings. Third, ... [he] must give consideration to the interests of justice.¹¹⁹⁵

In the detainee abuse hypothetical, it would appear at first blush that the ICC Prosecutor should have little difficulty in determining that the first factor has been met, since the language of the 1998 Rome Statute defining “war crimes” mirrors that of the relevant Geneva Conventions.¹¹⁹⁶ However, the Rome Statute adds an additional requirement that the war crimes be “part of a plan or policy or as a part of a large-scale commission of such crimes.”¹¹⁹⁷ There was no evidence in the hypothetical that the detainee abuse met these requirements.¹¹⁹⁸ Thus, not even the first factor would be met, and the ICC could not assert jurisdiction over the Americans involved in the detainee abuse hypothetical.

The second factor of admissibility is the specific articulation of the principle of complementarity¹¹⁹⁹ in terms of the ability and willingness of a State to genuinely investigate, and if warranted, prosecute the individuals involved.¹²⁰⁰ If the United States military responded to the hypothetical detainee abuse similarly to other

¹¹⁹⁵ Iraq Response Letter, *supra* note 251, at 4-7.

¹¹⁹⁶ Rome Statute, *supra* note 6, at Art. 8.2(a) & (c). *See supra* notes 368-70 and accompanying text.

¹¹⁹⁷ Rome Statute, *supra* note 6, at Art. 8.1. *See generally supra* note 251.

¹¹⁹⁸ Secretary of State Rice has stated that the vast majority of U.S. soldiers serve honorably, and that there are usually only a few people involved in detainee abuse. Secretary of State Condoleezza Rice, ASIL 100th Mtg., *supra* note 27, “A Conversation with Secretary of State Condoleezza Rice,” Mar. 29, 2006.

¹¹⁹⁹ *See supra* notes 242-47 and accompanying text.

¹²⁰⁰ Rome Statute, *supra* note 6, at Art. 17.

allegations of detainee abuse,¹²⁰¹ this would arguably demonstrate a genuine ability and willingness to investigate and prosecute, and would thus satisfy the ICC's principle of complementarity.¹²⁰² Thus, the second factor considered by the ICC Prosecutor would likewise fail to support ICC jurisdiction over the Americans involved in the hypothetical detainee abuse.

The third and final factor for the ICC Prosecutor to consider is: "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."¹²⁰³ The detainee abuse hypothetical is of even less gravity than the 240 actual communications received by the ICC Prosecutor concerning, *inter alia*, allegations of willful killing of four to twelve victims, and the inhuman treatment of less than twenty civilians in Iraq.¹²⁰⁴ The ICC Prosecutor found that even this more significant number of alleged victims "did not appear to meet the required threshold of the Statute," and refused to seek authorization to initiate an investigation.¹²⁰⁵ Similarly, the third factor of "interests of justice" is not satisfied, under the broader rubric of complementarity. This does not even consider the moderating influence that Article 98 agreements¹²⁰⁶ and the "Hague Invasion Act"¹²⁰⁷ would have on the ICC's decision to seek to impose jurisdiction over the Americans involved.

¹²⁰¹ See, e.g. Army Fact Sheet, *supra* note 366 (noting that of 109 cases with substantiated allegations of detainee abuse, 32 went to courts-martial, 56 were handled by non-judicial punishment, and there were 32 related administrative actions, totaling 120 actions). But see, e.g. Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006 (arguing that the United States did not properly investigate alleged detainee abuse in Afghanistan, and that the United States would have to submit to some risk in order to ensure that the ICC is able to review the courts-martial of other States).

¹²⁰² This deference to State investigations and prosecutions was supposed to reassure the United States, with its established military justice system. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹²⁰³ Rome Statute, *supra* note 6, at Art. 53(1)(c).

¹²⁰⁴ Iraq Response Letter, *supra* note 251, at 7-8

¹²⁰⁵ *Id.* at 9.

¹²⁰⁶ See *supra* notes 340-53 and accompanying text.

¹²⁰⁷ See *supra* notes 354-65 and accompanying text.

9.5 CONCLUSIONS

States have asserted universal jurisdiction over war crimes “[s]ince time immemorial,”¹²⁰⁸ even without a *nexus* to “either the crime, the alleged offender, or the victim.”¹²⁰⁹ The universal condemnation of war crimes justifies their prosecution¹²¹⁰ by any State in order to vindicate the international community’s interests in prosecuting these offenses.¹²¹¹ Although authors may quibble on the margins, the core definition of war crimes would seem to be fairly well established, particularly in light of the general acceptance by one hundred State parties of the ICC’s definition.

Historical efforts at establishing an international tribunal to prosecute war crimes culminated in the International Military Tribunal (IMT) in Nuremberg following World War II. Recognizing the tribunal’s place in history, IMT chief prosecutor Justice Jackson ensured that the rule of law supplanted mere victors’ justice. However, the IMT’s jurisdiction was relatively short-lived, and States subsequently intent on prosecuting war criminals had to resort back to universal jurisdiction to do so. The fact that the State of Israel successfully prosecuted Adolph Eichmann for his war crimes during World War II, and yet ultimately failed to convict John (Ivan) Demjanjuk for his alleged involvement in Nazi extermination camps, reinforces the legitimacy of universal jurisdiction as having the rule of law as its foundation.

For a myriad of reasons, there has been a “general revival of the concept of universal jurisdiction.”¹²¹² Many States enacted domestic legislation providing for universal jurisdiction over war crimes that represent “grave breaches” of the 1949

¹²⁰⁸ DINSTEIN, *supra* note 2, at 228.

¹²⁰⁹ Randall, *supra* note 10, at 785.

¹²¹⁰ Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 384 (2001).

¹²¹¹ Sriram, *supra* note 17, at 316.

¹²¹² Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Jan. 10, 2006).

Geneva Conventions. A handful of European States have gone further to authorize universal jurisdiction over lesser war crimes and other international crimes, even those committed by non-nationals against nonnationals in foreign territory. The United States is more restrictive in asserting extraterritorial *criminal* jurisdiction under the rubric of universality (requiring some nexus to the United States), and yet is more willing to assert extraterritorial jurisdiction in *civil* suits seeking monetary damages.

Ad hoc international tribunals served as preliminary efforts at establishing a more permanent ICC in 2002, which both supports and supplants the domestic exercise of universal jurisdiction over war crimes. The ICC *supports* the application of universal jurisdiction domestically by enforcing the primacy of domestic courts over the ICC via its complementarity principle, by only considering the most serious, systematic and factually supported allegations of war crimes, and by imposing a number of substantial hurdles before the ICC can assert its jurisdiction, including placing significant controls on the ICC Prosecutor. The ICC *supplants* the application of universal jurisdiction domestically for States that are either unable or unwilling to *genuinely* investigate or prosecute alleged war criminals found within their jurisdiction. Yet by supplanting a State's inaction or inability to exercise universal jurisdiction over alleged war crimes, the ICC is in effect bolstering the application of universal jurisdiction by ensuring that the most heinous war criminals neither continue to commit atrocities with impunity, nor escape responsibility for their past war crimes.

The U.S. objections to the ICC do not seem particularly well-founded. U.S.-centric concerns have either been adequately addressed (e.g. noninterference with the UN Security Council's control over the peace process), are unrealistic (e.g. the absence of jury trials and the death penalty when the ICC's due process guarantees otherwise closely mirror those of the United States), or are patently wrong (e.g. inadequate qualifications of the ICC judges). The concern that U.S. military service members would be exposed to potential criminal liability at the ICC for military-related activities abroad ignores the fact that in the absence of the Rome Statute, U.S. service members already would be criminally liable in

foreign domestic courts for alleged war crimes committed abroad. Ironically, the concern about potential criminal exposure for U.S. civilian and military leaders for the as-of-yet undefined crime of aggression could be more effectively addressed if the United States were to ratify the Rome Statute *before 2009* (when the State parties could first potentially amend the Rome Statute to define the crime of aggression), since after that date, the United States could be bound by the amended treaty. Perceived inefficiency may be a valid objection, but it would seem to be somewhat premature. Finally, the U.S. objections appear to be myopic, and ignore the fact that the ICC's impetus was not to impose potential liability on Americans, but to deal with war crimes committed by “‘atrocious lords’ who seek to massacre people” on a wide scale.¹²¹³

Objections to the ICC have led to a campaign of active U.S. opposition, including using economic leverage to deny support to the ICC, domestic legislation to penalize cooperation with the ICC, and strong-arming allies into signing Article 98 “bilateral agreements to block all assistance to the ICC and guarantee that no Americans would ever be handed over to the international court.”¹²¹⁴ These Article 98 agreements are overbroad (protecting all Americans acting even in their private capacities (e.g. American tourists) versus merely U.S. service members engaged in official military duties), serve as a double standard (since the United States is willing to send suspected *foreign* war criminals to the ICTY, ICTR, and the ICC, but not Americans), and reveal that the United States is willing to use its economic and political clout as blunt instruments to influence other States’ behavior. The “American Service members Protection Act (ASPA) of 2002” (a.k.a. “The Hague Invasion Act”) merely ‘adds fuel to the fire.’ All of these opposition efforts are diplomatically offensive and bitterly ironic, given the United States’ nurturing support for the IMT at Nuremberg, and earlier efforts at establishing an ICC.

¹²¹³ Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

¹²¹⁴ Ferencz, *supra* note 71, at 236.

A simple detainee abuse hypothetical¹²¹⁵ reveals why the United States should have little reason to fear the ICC (other than possibly defining the crime of aggression in 2009, for which U.S. interests would be better served by ratifying the Rome Statute before then as previously discussed).¹²¹⁶ If the detainee abuse hypothetical had occurred *before* the advent of the ICC in 2002, both the United States would have jurisdiction (based on the nationality of the alleged American perpetrators), and Afghanistan would have jurisdiction (based on either the territoriality or passive personality principles). Neither the ICC nor the U.S. opposition measures (i.e. Article 98 agreements and “The Hague Invasion Act”) have affected the primacy of domestic jurisdiction over the alleged war crimes. In fact, the ICC principle of complementarity has *reinforced* the primacy of domestic jurisdiction.¹²¹⁷

Another State could also assert universal jurisdiction over the alleged American war criminals in the detainee abuse hypothetical, which has likewise not been affected by the ICC.¹²¹⁸ Only if the United States, Afghanistan, and another State asserting universal jurisdiction (e.g. Belgium) were either unable or unwilling to *genuinely* investigate or prosecute the alleged war criminals found within their jurisdiction would the case be admissible before the ICC, and then only if the alleged war crime was sufficiently serious (i.e. part of a plan, policy, or large-scale commission of such crimes),¹²¹⁹ and the alleged war crime could surpass the other hurdles to ICC jurisdiction.¹²²⁰ Thus, despite the U.S. concerns and active opposition, the ICC does not operate as a usurper of domestic jurisdiction, but rather as a safety net for when domestic jurisdiction fails.

¹²¹⁵ See *supra* notes 366-70 and accompanying text.

¹²¹⁶ See *supra* notes 239-41, 311-14, 317-22, and text preceding note 440.

¹²¹⁷ See *supra* notes 415-34 and accompanying text.

¹²¹⁸ For example, if Belgian authorities arrested the alleged American war criminals while they were transiting through Belgium en route to the United States, Belgium could assert universal jurisdiction over them. See *supra* notes 408-11 and accompanying text.

¹²¹⁹ Rome Statute at Art. 8(1).

¹²²⁰ See *supra* notes 233-58 and accompanying text.

As Professor Dinstein so eloquently commented:

Absent effective mechanisms of supervision and dispute settlement, there is no way to guarantee that [the Law of International Armed Conflict, or LOIAC] is actually implemented..... There is a growing acknowledgement of the need to ensure individual penal accountability of war criminals for serious breaches of LOIAC, but the future of the International Criminal Court is still shrouded in doubt.¹²²¹

The continued application of universal jurisdiction over war crimes by States' domestic courts, and international tribunals such as the ICC, would appear to fill "the need to ensure individual penal accountability of war criminals for serious breaches"¹²²² of the Law of War.

¹²²¹ DINSTEIN, *supra* note 2, at 257.

¹²²² *Id.*

CHAPTER 10

UNIVERSAL JURISDICTION AND ICTR. TOWARDS RECONCILIATION: GLOBAL APPROACHES

Reconciliation can be one of the main goals of conflict resolution but, how to achieve it?. Several studies are known to state either explicitly or in a veiled manner that the path of the administration of justice stands at odds or is even incompatible with peace building venues. In fact, this situation is very often regarded as a dilemma. Aware of the strain that can possibly arise, not just from the differences between these two ways, but first and foremost among the different players and professionals involved in the latter, this short paper aims at contributing elements that can integrate both approaches. The paper argues forcibly in a short and incomplete manner-how the system of observance of human rights in place for the last sixty years, and the recent emergence of victims as international players together with other individual and collective players from civil society and ethnic groups-, can offer more integrative approaches to reconcile both paths under the common umbrella of non-violent conflict resolution.

Above and beyond the decisive involvement of governmental players and of international, regional and universal institutions, a crucial question arises: what role do non-governmental players have? What role do the latter play not only in generating, fostering, channeling, neutralizing or perpetuating violent conflicts of today's day and age, but also in preventing, handling, solving or transforming them in a non-violent way? We refer here to national and transnational civil societies, to victims both as individuals or collectively, to ethnic groups and peoples, or even to multinational companies, some of which hold more power, more resources and more leverage and influence than many nations in the planet. What role do victims play or should play, both in the processes of justice

as well as in peace-building processes? Should they be involved, and, if so, how and to what extent? Regarding processes of justice, what role do victims play or should play in investigating or revealing hidden truths or truths that have been concealed about the violent conflict and in the fight against impunity? What role, more specifically, in investigating, producing and/or enabling evidence; in pressing direct or indirect charges for international crimes or systematic human rights violations, in indictments in application of current international law – or the rising ability to improve or create new concepts of international law? What role should victims play in matters dealing with moral and/or material compensation or damages, among others? All of the above refers to their potential involvement in universal and/or international justice processes which apply international law to the more serious international crimes, such as genocide crimes, crimes against humanity, war crimes – including gender crimes and large-scale pillage of natural resources, torture, etc.

When it comes to peacemaking and peace-building, what role do victims play – or could play – in the following areas: in national and international negotiations, in mediation and reconciliation related to violent conflict; in processes of multilateral dialogue at varying levels; in other peacemaking or peace-building processes in a general sense; in initiatives known as preventive of future violent conflict; in the process of transformation of existing violent conflict; in moral and/or material compensation and damages; in post-conflict or post-war rehabilitation; in security systems and systems of protection of human rights; civil diplomacy; historical memory; processes of truth, forgiveness and reconciliation; in the restatement of the Rule of Law; in the political system, the security and defense systems, in humanitarian crises, among others?

These questions could broaden to include the potential involvement of other non-governmental players, especially that of national and international civil society. Clearly, the answers to these questions will affect, in fundamental ways, both the processes of justice and/or peace building themselves as well as the outcome of their outcome.

10.1 CIVIL SOCIETIES, VICTIMS, JUSTICE PROCESSES AND PEACE PROCESSES.

10.1.1 CIVIL SOCIETY, VICTIMS AND JUSTICE PROCESSES.

Undoubtedly, civil society at large, and victims in particular, have gone from being mere spectators falling prey to violent and/or armed conflict to getting actively involved at varying lengths in processes of justice and/or peace. Their participation has also extended to exerting an increasing influence on political and democratic processes related to armed or diplomatic intervention in armed or violent conflicts, both at the national and international levels. Many governmental players, formal diplomacies, as well as national and international organizations have not concealed their misgivings as they watched these developments, often perceiving them as invasive of a turf which ‘does not belong’ to victims or civil society, but rather only to those “with the knowledge and expertise” and those “who count.” On the other hand, many other governmental players, formal diplomacies, as well as national and international organizations follow this process with careful attention and even foster this development within the periods of time and frameworks that institutions and civil society have agreed on.

It is not my intent to be exhaustive, but with regard to Spain¹²²³ and other countries with **Roman Germanic or continental justice systems** which to varying degrees allow for victims to participate and be legally represented in processes of justice, it is worth highlighting the decisive involvement and intervention shown by Argentina’s ‘Madres y Abuelas de la Plaza de Mayo’; by Spanish, Argentine and Chilean victims; Spanish and Guatemalan Maya victims; Catalanian, Spanish, Rwandan and Congolese victims; Tibetan victims; Palestinian victims, etc. all of them with regard to their roles in articulating, presenting, investigating – and even filing formal charges – in processes of universal justice in application of current international law. In turn, given the

¹²²³ See Articles 101 and 270 of the Criminal Procedures Act in agreement with Article 23,4 of Spain’s Organic Law of the Judiciary (L.O.P.J.) concerning international crimes mentioned there. For a more detailed analysis of the established rule and of universal justice trials featuring the involvement of victims in different countries; see Martínez, 2008, Pages 10-11; as well as Palou-Loverdos, 2007, Pages 60- 63.

practices of the Nuremberg and Tokyo Trials, or of *ad-hoc* Courts for the former Yugoslavia and Rwanda, or of other mixed courts, most of which were inspired on the Anglo Saxon system of justice where the intervention or legal representation of victims is deemed unthinkable, the new International Criminal Court has created a new system of justice. A hybrid between the Continental and Anglo-Saxon systems, this new system marks the first time ever that an international court offers victims¹²²⁴ the real possibility of participating and having legal representation albeit in a more restricted way than in continental national systems of justice.

10.1.2 CIVIL SOCIETY, VICTIMS AND PEACE PROCESSES

Likewise, it is worth noting the increasing involvement which representatives of civil society including victims and relatives of victims are having in peace processes, as well as the impact that their participation can make on the latter. Several different scholars investigating these processes have underlined in their empirical studies that participation of civil society in peace negotiations makes it easier for agreements to be more feasible and sustainable¹²²⁵. There is no shortage of examples showing that representatives of civil society have made important contributions to formal peace talks in countries as diverse as Sierra Leone, Liberia, Burundi, Aceh or Uganda. In these cases they have to varying degrees strengthened the content of the agreement, expanded and reinforced their legitimacy, as well as created conciliatory and integrative dynamics between the parties more reluctant to reach an agreement¹²²⁶. This paper gives below a brief account of processes in Rwanda and in the Democratic Republic of Congo.

¹²²⁴ See Articles 68, 69 and concordant articles of the Statute of Rome of the International Criminal Court and Rules 63, 85 and concordant rules of the Rules of Procedure and Evidence of the ICC, as well as Article 42 and concordants of the Regulation of the Trust Fund for Victims (http://www2.iccpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-A7E9AC89C30/140126/ICCASP432Res3_English.pdf) (June 4 2009 search). 108 countries have signed the ICC's Statute of Rome, 30 of them are African nations, 14 are from Asia, 16 from eastern Europe, 23 nations are from Latin America and the Caribbean, and 25 nations are from Western Europe and elsewhere.

¹²²⁵ Pfaffenholz, Kew and Wanis, 2006.

¹²²⁶ Hayner, 2009, Pages, 12-13.

10.2 HUNGER AND THIRST FOR JUSTICE AND PEACE: DO THE GODDESSES STRUGGLE OR COOPERATE?

We hear it again and again everywhere on our planet. Literally and figuratively, the world starves and thirsts for justice and peace. In past papers I have talked about notions of law and mediation, looked at their etymological roots and principles, and delved into the symbols linked to mythological characters mentioned since times immemorial.¹²²⁷ Both *Goddess Maat* or *Goddess Themis*, who stand for the administration of justice among clashing parties, hold a sword as their major symbol. On the other hand, *Goddess Nefertem* or the *Goddess of Temperance*, who stand for mediation and enabling peace-building among opposing parties, feature water as their main symbol. Whether acting as ruling judge or as facilitator/restorer, this third middle character standing between the two adversary parties who represent the duality of the conflict, makes use of tools and symbols which are at the same time analogous and different. Since times past, human beings have satisfied their hunger by resorting to sharp and cutting linear elements, such as the flint, teeth or knives tools which find their equivalent in the sword that rules justice between the two weighing pans of a scale. To quench thirst, human beings have used flexible, round elements, such as their hands, a leaf or a bowl, to contain water element akin to the liquid that flows between the two amphorae of Temperance.

Justice and law experts, on the one hand, and experts in mediation and peace-building, on the other, often claim their respective venues and methods to be the most efficient when it comes to tackling or managing, solving or transforming violent conflict. When mediators, negotiators and facilitators of peace processes step in, legal professionals frequently regard them to be meddling with the evidence or sentences they have had a hard time securing. This is particularly the case when there is talk of possible peace agreements that would allow for partial or total amnesties or impunities. In turn, once they have reached an agreement with one or many key players in an armed or violent conflict, peace-builders or peacemakers perceive any arrest warrants, trial orders or sentences

¹²²⁷ Palou-Loverdos, 1999, Pages 88-109; and Palou-Loverdos, 2006.

resulting from legal proceedings held in application of international law to be an outright attack to the peace process or to their hard-won agreements. Such tensions don't merely arise between these two fields which seem to start apart in terms of their methodology, principles and dynamics. They also appear within a same field, for example, between retributive and restorative justice; or between those which advocate abiding by the guidelines of the Rule of Law or those which focus on the range of measures known as Transitional Justice¹²²⁸ which comprises a useful mix of judicial and non-judicial measures centering on the responsibility for international crimes of the past. This approach includes initiatives for criminal accountability; truth commissions, reparations programs; reform of the security and judiciary sectors; demobilization and integration of ex-combatants and community-based justice initiatives¹²²⁹, among others. Legal professionals are well aware that during the course of the legal proceedings¹²³⁰, they sometimes need to replace the sword with the water. Peace-builders, in turn, know that they more often than not have to brandish the sword when negotiating, mediating or facilitating among opposing parties¹²³¹, for the benefit of the two parties involved, the process itself and the actual outcome. There is increasing agreement that mediators should not validate an agreement between the parties which grants amnesty to the perpetrators of the most serious international crimes¹²³², since this would prove unacceptable to both the international community and the United Nations system.

Some authors point to these tensions or alleged dilemmas and conclude, through various arguments, that we are better off saying that the systems complement each other. They argue that establishing one single model applicable on a

¹²²⁸ See Lekha, Martin-Ortega and Herman, 2009, Pages 3-4.

¹²²⁹ See, *op.cit.*, Negotiating justice: guidance for mediators, Pages 11-12.

¹²³⁰ Especially in the case of protected witnesses or particularly traumatized victims.

¹²³¹ Mediators or facilitators must occasionally resort to 'sharp tools' in order to maintain the balance between the parties, ensure one party's capacity of self determination, preserve respect towards both parties' dignity and face and react to issues of responsibility for serious international crimes, among other similar situations.

¹²³² See *op.cit.* Priscilla Hayner, Pages 6-7; and Monica Martinez, 13-14.

universal scope is ill-advised. It is preferable, they continue, to devise a distinct, custom-tailored approach to suit each individual territory, taking into account the historical cross-roads, the potential players, as well as the content, magnitude and degree of the violent conflict at stake, while at the same time bearing in mind certain principles or guidelines derived from past experience.¹²³³ Although there doesn't yet appear to be consensus on this approach, it would seem advisable for the two goddesses to work with each other in a joint effort to alleviate as much as possible humankind's hunger and thirst in body and soul. In their endeavor these deities should make available their complementary venues of peaceful justice¹²³⁴ and just peace¹²³⁵, placing truth as the cornerstone and backbone of all other principles, interests and needs.

10.3 RWANDA/DEMOCRATIC REPUBLIC OF CONGO: A TWO-TRACK COMBINED APPROACH

This paper does not attempt to make even a brief analysis of the large scope of the conflict which has raged in Rwanda and in the Democratic Republic of Congo and the international crimes that have been and still are- executed in both nations,¹²³⁶ nor of the number of peace processes conducted and/or stalled there.¹²³⁷ Nor, for that matter, can it look at the various interventions which

¹²³³ Op.cit., Monica Martinez, 2008, Pages 12-13 and 15-17, Priscilla Hayner, 2009 pages, 5-6 and 20-22, ; Chandra Lekha Sriram-Olga Martin Ortega and Johana Herman, 2009, pages 2-6. Pages 12-13 and 15-17, 5-6 and 20-22, 2-6.

¹²³⁴ That is, justice processes not centered on repression, punishment or revenge, (while not disregarding applicable sentences) but carried out by adversarial means, with all due guarantees and respect for fundamental human rights. These justice processes establish an internationally accepted criterion to determine responsibility and put an end to the impunity of perpetrators of serious international crimes- all along taking the utmost care to address the basic needs of the people and adhere to the truth of the facts.

¹²³⁵ That is, peace-building processes that don't aim at securing partial and provisional agreements that may only make do. Rather, those processes which strongly observe the principles of mediation, reconciliation or the facilitation of dialogue, while at the same time not leaving out issues of social justice and formal justice in order to merely reach a visible agreement (particularly issues that address the granting of amnesties and the establishment of some kind of accountability for the most serious international crimes). Likewise, these approaches take great care to address the basic needs of the people and adhere to the truth of historical processes.

¹²³⁶ For more information on the alleged war crimes and a factual and judicial analysis, see: Palou Loverdos, 2007.

international justice venues (International Criminal Court for Rwanda¹²³⁸) undertook to investigate the countless international crimes perpetrated in Central Africa. Causing the death of almost 8 million people - Rwandan, Congolese, Burundian, Spanish, Canadian, Belgian and British victims, among others – this conflict has claimed the lives of more civilians than any other conflict since the Second World War¹²³⁹.

This paper merely looks at a modest but forceful example of a joint initiative where civil society and the victims of this conflict have come together to create a mixed approach which combines the path of justice with that of peace¹²⁴⁰ in an

¹²³⁷ Although a wide range of violent incidents have continued to occur in Rwanda since October 1, 1990, the UN and many international NGOs consider there aren't any violent conflicts or systematic violations of human rights which deserve special attention; in addition, most peace experts don't mention the Arusha Peace Agreement in their papers. The Arusha Agreement had been subsequently frustrated by several episodes, especially by the April 6, 1994 assassination of the presidents of Rwanda and Burundi that unleashed the infamous genocide in Rwanda as well as the chain of ongoing serious international crimes in this country and in the Democratic Republic of Congo which have only recently been subject to formal investigation.

¹²³⁸ Considering that ICTR Statute stands, among other provisions: “... *Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace...*”, but for that main purposes –national reconciliation and restoration and maintenance of peace- limits it's competence differently to what it's stated for the International Criminal Tribunal for the Former Yugoslavia, as following “... *The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute*” (article 1 ICTR Statute, <http://www.un.org/ict/statute.html>), I leave for the more ICTR experts and co-panelists (of the Conference “*International Criminal Tribunal for Rwanda: an independent Conference on its legacy from the Defence Perspective*”) the analysis whether those goals have been achieved partially or totally. A large number of Rwandans –and also a large number of “invisible” Congolese victims affected by Rwandan military operations after 1996 up to present- have the perception not only the ICTR goals have not yet been achieved but its incomplete and biased output fuels violent conflict not only in Rwanda but in Central Africa.

¹²³⁹ For a condensed analysis of the conflict and the two strategic paths used to transform it through the impetus given by civil society and victims: http://www.veritasrwandaforum.org/material/sintesi_en.pdf

¹²⁴⁰ To cite another example, in Colombia, institutional bodies have opted for using transitional justice mechanisms even though many experts believe this is happening at a time when the conflict is still alive (and hence talk of transition and post-conflict proves difficult). In this case, it is the government and its branches that hold this commitment, basing it on the Law of Justice and Peace passed in 2005 which the Colombian Constitutional Court reinterpreted in a resolution the following year. To this effect, see Felipe Gomez Isa, *Paramilitary Demobilization in Colombia: Between Peace and Justice*. Working Paper Nr. 57, April 2008. Rwanda and the Democratic Republic of Congo are both at different phases; it is difficult to speak of post-conflict situations in their case as well. Especially in Rwanda; no process of transition has taken place. The two-path initiative explained in this section thus applies mechanisms of transitional justice

attempt to transform the conflict by non violent means and achieve its resolution for the benefit of current and future generations in Central Africa. The initiatives, as we will see, do not aim at becoming a universal model to be applied on a global scale. Rather, they represent an example of how the venues of justice, on the one hand, and those of dialogue, on the other, can enhance and reinforce each other in order to reconstruct the social, political and economic fabric of a society devastated by armed conflict.

10.3.1 THE JUSTICE APPROACH

At the end of the nineties a number of prominent personalities, victims, relatives of Spanish, Rwandan and Congolese victims, national and international non-governmental organizations and some public institutions all of whom constitute the organization International Forum for Truth and Justice in the African Great Lakes Region joined forces and resources to initiate an international process to investigate major international crimes perpetrated in Rwanda and the Democratic Republic of Congo between October 1990 and July 2002¹²⁴¹ (start of the International Criminal Court's temporal competence) and which had not been subject to investigation by any national or international jurisdictional body.

10.3.2 Justice and the struggle against impunity for international crimes in Central Africa

In 2005, after years collecting information and documentary evidence and gathering witnesses, these parties¹²⁴² filed a lawsuit at the Spanish courts in application of the principle of universal justice. On February 6, 2008, after years conducting their formal investigative proceedings, the Spanish courts issued a Bill of Indictment and international arrest warrants against 40 top officials of

to a situation of conflict where there is in fact an absence of transition. In contrast to Colombia, the initiative originates in the involvement civil society has had and coordinated at the national and international levels.

¹²⁴¹ For more information: <http://www.veritasrwandaforum.org/querella.htm>.

¹²⁴² See victims, family victims, NGO's, personalities and public institution claimants http://www.veritasrwandaforum.org/querellantes_en.htm.

Rwanda's¹²⁴³ incumbent political military helm which has held power in Rwanda since 1994. The arrest warrants charge them with the crimes of genocide, crimes against humanity, war crimes and terrorism, among others. According to that decision¹²⁴⁴ that Spanish courts decided to make public¹²⁴⁵ considering its entity, the Judge has obtained numerous pieces of testimonial and documentary evidence, as well as evidence from expert witnesses, regarding the aforementioned crimes allegedly perpetrated by the RPA/RPF in Rwanda and the Democratic Republic of Congo in the period 1990-2000, primarily. This investigation has allowed to reveal that the RPA/RPF's rigid, hierarchical chain of command, headed by current President Paul Kagame, is responsible for three major and closely interrelated blocks of crime¹²⁴⁶.

The investigation has shown that large scale crimes took place in Central Africa at all different stages: prior to, during and after the mass killings of the Tutsi population that took place in the period April-June 1994 all of them classified as genocide by the UN Security Council in its ad hoc resolution¹²⁴⁷. The official version that has managed to prevail in international public opinion, however, only points to the killings occurred in the above-mentioned period. The judicial

¹²⁴³ At least 9 of them were away from Rwanda the moment the decision was made public, holding important positions, even within the UN organization: 4 of them worked for the hybrid peace-keeping forces in Sudan (UNAMID), including a Rwandan army general who is the second commander of such forces. A fifth one served at the demobilization arm of the UN Development Program (UNDP) in Nepal. Several public institutions had formally requested the UN to destitute them and turn them over to justice (see all at: http://www.veritasrwandaforum.org/dossier/resol_Ban_Ki_Moon_es.pdf).

¹²⁴⁴ See judicial resolution: http://www.veritasrwandaforum.org/dossier/resol_auto_esp_06022008.pdf; See also mistrust of Rwanda and African Union related to universal and international justice initiatives, (Martin Vidal, 2008), pages 3-6.

¹²⁴⁵ A lot of international media and international experts reported about that universal jurisdiction preliminary decision. See a selection of it in various languages at http://www.veritasrwandaforum.org/dossier_40ordres.htm. See also experts reports as "*The Spanish Indictment of High-ranking Rwandan Officials*", Journal of International Criminal Justice, Vol 6 Num 5, pp 1003-1011, <http://jicj.oxfordjournals.org/cgi/content/abstract/6/5/1003>

¹²⁴⁶ Synthetically, a) crimes perpetrated against 9 Spanish victims - missionaries and aid workers- whose first priority was helping the local population and by so doing, were all inconvenient observers of the killings of Hutu inhabitants in both countries; b) crimes against Rwandans and Congolese, either perpetrated pointedly against various specific leaders, or systematically carried out as mass murders of hundreds of thousands of civilians; and c) crimes of war pillage- the systematic, large-scale plundering of natural resources, especially strategically valuable minerals.

¹²⁴⁷ See also ICTR decisions (<http://www.un.org/ictj/judgement.html>).

decision brings to light an array of facts: first, that RPA/RPF army units and around 2,400 military men – backed by military, logistical and political support from Uganda – had already, as early as October 1, 1990, invaded northern Rwanda, causing the death of countless Hutu civilians. Secondly, that from 1991 to 1993, the RPA/RPF had carried out a great number of open and carefully targeted military operations against civilians through its two executor agents the RPA's regular army and the Directorate Military Intelligence or DMI's secret services- , creating likewise special death squads such as the “*Network Commando*”. Thirdly, that in 1994 the RPA buried and hid in Uganda large amounts of weapons (to be smuggled later into Rwanda) before planning the attack against J. Habyarimana, Rwandan president at the time, which was the event that triggered the entire chaos. Further to that action in 1994, as well as in 1995, the RPA and DMI perpetrated mass and targeted crimes against civilians, mostly Hutu, following Paul Kagame's explicit instructions to eliminate the population indiscriminately. Following the decision the *RPA* and *DMI* also organized collective burials in mass graves and mass incinerations of corpses in Akagera or Nyungwe Parks. The investigation had also revealed that in 1996 and 1997, the RPA/RPF set out to systematically attack Hutu refugee camps in former Zaire, killing hundreds of thousands of Rwandans and Congolese. According to the decision and the UN reports- it also organized the plundering of mineral resources such as diamonds, coltan and gold, thereby creating the intricate web of corruption led by the “*Congo Desk*”, the *DMI* and Rwandan companies among them, *Tristar Investment*- all of whom were backed by multinational corporations and Western powers¹²⁴⁸. During its second military invasion which started in 1998, it continued to engage in these activities setting forth its trail of killing and plundering which continues to date in the eastern part of the Democratic Republic of Congo.

¹²⁴⁸ See various UN Group of Experts Report on Illegal Exploitation in DR Congo (S/2001/357, 12 April 2001; S/2002/1146; 16 October 2002; and last S/2008/773 12 December 2008, among others).

10.3.3 Approach to Universal Jurisdiction and last changes in Spanish Law

As you may be aware, the doctrine of universal jurisdiction allows national courts to try cases of the gravest crimes against humanity, even if these crimes are not committed in the national territory and even if they are committed by government leaders of other states. Those courts apply international law. These initiatives have been both widely applauded and criticised¹²⁴⁹. Last year, after the 2008 Spanish courts decision against the 40 high ranking Rwandan officials, the current President of the Republic of Rwanda asked to United Nations, African Union and European Union to stop the abuse of universal jurisdiction and not to execute the international arrest warrants. He had success with African Union in its 11th Summit in Sharm el Sheikh (7/1/2008)¹²⁵⁰, in a previous decision to the well known decision about Sudanese President Al Bashir International Criminal Court indictment. This year 2009 at the General Assembly of United Nations he addressed a speech congratulating himself that this initiative is taking place at UN¹²⁵¹.

On June 25th 2009 a bill to amend existing universal jurisdiction legislation in Spain was passed by the Spanish Congress and was later approved in the Senate on October 7th 2009. The bill follows an agreement between Spain's two

¹²⁴⁹ See two examples: “*The Pitfalls of Universal Jurisdiction*” By Henry Kissinger (US former Secretary of State and National Security Advise) for one side (Global Policy, <http://www.globalpolicy.org/component/content/article/163/28174.html>) and “*The case for Universal Jurisdiction*”, by Kenneth Roth (Executive Director of Human Rights Watch) for the other (Global Policy, <http://www.globalpolicy.org/component/content/article/163/28202.html>.)

¹²⁵⁰ See the 2008 AU Summit Resolution in : http://www.taylorreport.com/Documents/DECISION_ON_THE_REPORT_OF_THE_COMMISSION_ON_THE_ABUSE_OF_THE_PRINCIPLE_OF_UNIVERSAL_JURISDICTION.doc. This was also internationally reported, I quote “*the assembly made eight resolutions where it noted that the abuse of the principle of universal jurisdiction is a development that could endanger international law and order. It further noted that the political nature and abuse of the principles of universal jurisdiction by judges from some non-African states against African leaders, particularly Rwanda, is a clear violation of their sovereignty and territorial integrity*”, <http://allafrica.com/stories/200807071845.html>.

¹²⁵¹ Read his speech at UN General Assembly, October 5th 2009, “*Improving global governance has also to address international justice. International justice should be fair to all - rich and poor; strong or weak. We are pleased to note that the sixty third session of the United Nations General Assembly undertook to comprehensively examine the issue of universal jurisdiction.*” See: <http://www.maximsnews.com/news20091005RwandapresidentUNGA1091000106.htm>. See works and contents at 2009 UN General Assembly about this matter (and the different positions of the countries) in <http://www.un.org/80/News/Press/docs/2009/ga13371.doc.htm>.

main political parties on amending Article 23.4 of the Spanish Organic Law on the Judicial Power (LOPJ in its Spanish acronym). The purpose of this amendment is to limit the capacity of Spanish courts to exercise jurisdiction over international crimes committed abroad by non-Spanish nationals. This can be considered as a loss to our common humanity¹²⁵². Spanish courts have been exercising universal jurisdiction for over a decade now. They have made an extraordinary contribution to the development of international criminal law and the fight against impunity. Article 23.4 LOPJ establishes that the Audiencia Nacional has jurisdiction over acts perpetrated by Spanish nationals and acts perpetrated by foreigners outside of Spain if such acts are alleged to constitute: genocide, terrorism, war crimes, and any other crime which should be prosecuted by Spain in accordance with international treaties.

The Spanish courts first exercised universal jurisdiction in 1998 when the Audiencia Nacional indicted several Argentinean and Chilean officials for their alleged roles in abuses committed as part of Plan Condor¹²⁵³. Spanish courts have continued to address serious violations around the globe for which no alternate forum has been found. Such efforts include a case initiated by the Nobel Peace Prize laureate Rigoberta Menchu concerning the genocide, torture, terrorism, assassinations, and illegal detention in Guatemala, the above mentioned case against officials of the Rwandan Patriotic Army (RPA) and the Rwandan Patriotic Front (RPF) for crimes allegedly committed against Hutu Rwandans, Congolese, and nine Spanish victims surrounding the Rwandan genocide (1990-2002). The courts have also addressed such human rights issues as Chinese abuses in Tibet and the US torture of Guantanamo detainees.

¹²⁵² See also “*Preserving Spain’s Universal Jurisdiction Law in the Common Interest*”, Jurist, University of Pittsburg School of Law, by author of this paper and Olga Martin Ortega (Centre of Human Rights in conflict, University of East of London): <http://jurist.law.pitt.edu/forumy/2009/06/protecting-spainsuniversal.php>.

¹²⁵³ General Augusto Pinochet and other high ranking members of the former junta were among the 99 current or former members of the Argentinean military charged in the case. The fate of the proceedings against Pinochet is well known. While most of the indicted Argentineans were not extradited by Argentina, Mexico extradited former Argentinean military official Ricardo Miguel Cavallo in 2000. In 2001, Adolfo Scilingo was also detained, processed, and sentenced to a long prison term by the Audiencia Nacional for crimes against humanity committed in Argentina.

States have not only a right but a duty to guarantee that the most severe crimes—those which are considered to be committed not only against the victims, but against the international community as a whole—do not remain unpunished¹²⁵⁴. The amendments introduced to the Spanish law constitute an important step backwards in the effort to develop coherent global processes of accountability for human rights atrocities. International law has developed since the Nuremberg and Tokyo trials to provide norms and venues for the exercise of universal justice, as seen in the ad hoc Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Courts for Sierra Leone, East Timor, and Cambodia, and the International Criminal Court. Each of these mechanisms, acting in tandem with domestic courts, serve as instruments for the enforcement of human rights and international humanitarian law. Universal jurisdiction is only one of the tools available in the fight against impunity for severe human rights violations. Until now, the Spanish universal jurisdiction law had managed to withstand political pressure rising to the level of that which ultimately compelled Belgium to revise its own universal jurisdiction legislation. It was in the interest of the international community as a whole - of all of us - to preserve this instrument as another avenue of justice, complimentary to the International Criminal Court and potential hybrid courts. As Human Rights Watch spokesperson Reed Brody recently put it, the Spanish universal jurisdiction rule belongs not only to the Spaniards, but to all of us. It is -it was- part of the heritage of the international community.

10.3.4 THE CHANNEL OF DIALOGUE AMONG MEMBERS OF RWANDAN SOCIETY.

Aware that the justice approach represented an important yet insufficient step towards transforming the Rwandan conflict, preventing further violent incidents

¹²⁵⁴ Spain, therefore, is not acting as a “world policeman,” but is exercising both its right and its duty in international law. Now, Spanish courts would have to prove Spain’s specific interest in prosecuting any given crime. In order to do so, courts will have to evidence one of the following: the involvement of Spanish victims in the claim, the residence of the suspect in Spain’s territory, or a “special relation” between the crimes and Spain. The introduction of these conditions will severely restrict the use of universal jurisdiction as a complementary tool for the achievement of universal justice. In practice, this would mean that those crimes committed where there is no other option for justice - where the international community is unwilling or unable to establish international tribunals, or where the crime was committed before the International Criminal Court was established - will not be addressed. In such cases, victims will not be vindicated and justice will not be served.

and overcoming the tragedy of the two former decades, a group of prominent members of Rwandan civil society living abroad set out to start a dialogue from exile. Two persons initiated the dialogue: the Hutu president of a victims' association who lived in Brussels and the Tutsi former plenipotentiary ambassador of the current Rwandan government to the United Nations who lived in New York.

In 2004 ten Rwandan men and women of the diaspora met for the first time at a meeting organized by international facilitators in Mallorca (Spain). The Rwandans, both Tutsi and Hutu, were able to ascertain the different ways in which they each understood Rwandan history and the past according to their own personal, family and community experiences. At the same time, they also discovered the extent to which they agreed on constructive proposals for the future. In 2006, after two years in the works, a second encounter by then referred to as the Intra Rwandan Dialogue took place in Barcelona (Spain), giving rise to the International Network for Truth and Reconciliation in Central Africa. Twenty Rwandan nationals, both Hutu and Tutsi from the diaspora and the Rwandan heartlands, took part in this event. The meeting was organized with the sponsorship of Nobel Peace Prize nominee/candidate Juan Carrero and the support of both Nobel Peace Laureate Adolfo Pérez Esquivel, present at the meeting, and of the resident of Senegal Abdoulaye Wade. The protocol of findings of the 2006 event, which called for a more inclusive Inter-Rwandan Dialogue— served as the foundation for the talks held at five subsequent meetings entitled Dialogue Platforms in 2007 and 2008¹²⁵⁵. These five events took place in Washington DC for 20 participants from the USA and Canada; in Amsterdam for 20 participants from Holland, Belgium and Germany; in Orleans (France) for 20 participants from France and Italy; in Barcelona, where the Platform for Rwandan women was held; and finally in Kinshasa (Democratic Republic of Congo) where a special *ad hoc* platform was organized for Congolese participants coming from the eastern region of this country bordering with Rwanda.

¹²⁵⁵ With the support of, among others, Nobel Peace Laureate Adolfo Perez Esquivel; and of Federico Mayor-Zaragoza., former UNESCO Secretary General (1987-1999), President of “Cultura de Paz” and co-chairman of a top level UN group of Alliance of Civilizations.

In 2007 the Spanish Parliament extended its support to this initiative and passed a resolution where all political parties unanimously agreed to offer technical, legal, diplomatic and political support and urged to take it to an international¹²⁵⁶ level.

In early 2009 the eighth Dialogue held in Mallorca, Spain, featured the participation of thirty Rwandan men and women from all Rwandan ethnic groups- Hutu, Tutsi and Twa-, as well as two Congolese, who had come from Africa, Europe and North America. Celebrating five years since the dialogue started, they agreed to formally ask a Central African government to hold a Highly Inclusive Inter-Rwandan Dialogue, and request institutional and financial support from the international community.¹²⁵⁷ During the course of these five years, almost 150 Rwandan leaders have participated in the process. Among them, it is worth noting the involvement of two former prime ministers, various former cabinet ministers, former ambassadors, political leaders, representatives from civil society, from victims' as well as human rights organizations, from institutions devoted to peace and economic research. All of the above have set their eyes on the future and on carrying on this inter-Rwandan dialogue as the legitimate foundation upon which to build a new Rwanda that can be widely accepted by all political, ethnic, social and economic groups as well as by the international community.

10.4 INVESTING IN GLOBAL PEACE PROCESSES

Numerous studies study and analyze military expenditures worldwide. Military spending for 2007 alone, for example, reached 1,339 trillion dollars¹²⁵⁸. That

¹²⁵⁶ See original Proposal of Non-Legislative Motion of support to Intra-Rwandan Dialogue dated April 25 2007: http://www.veritasrwandaforum.org/dossier/congreso_diputados_eng.pdf (June 4 2009 search).

¹²⁵⁷ All documents with Findings and Proposals of the eight Intra-Rwandan Dialogue sessions to date (2004-2009) are available in several languages at: <http://www.veritasrwandaforum.org/dialogo.htm> (June 4 2009 search).

same year, 61 “peace operations” were carried out worldwide (41% of them in Africa), deploying a total of 169,467 people in missions which were almost entirely military: 119 countries sent troops, military observers or police officers totaling 150,651 people, a stark contrast to the 18,816 civilians¹²⁵⁹ overall.

There is no knowledge about the existence of studies that look at the amount spent worldwide on national and international processes of justice. Yet, if we want to have a rough idea of the huge disparity between military spending and expenditures on justice, we only need to point out the annual budget of the world’s leading international court: in 2009, the International Criminal Court, which is currently investigating four major situations in the Democratic Republic of Congo, in Uganda, in the Central African Republic and in Sudan, has a total budget of Euro 101.229.900¹²⁶⁰. *Ad hoc* Tribunals have an impressive budget even considering its partial results-: the General Assembly of the United Nations allocated a budget of 267, 356, 200 million dollars to the International Criminal Tribunal for Rwanda (ICTR) for the 2008/2009 period¹²⁶¹, which constitutes 6,4% of the total budget of the United Nations for the two years to come.

¹²⁵⁸ See Stockholm International Peace Research Institute, *SIPRI Yearbook 2008*, Catalan translation, Fundacio per la Pau 2008, Petter Stalenheim, Catalina Perdomo e Elisabetk Skons- Page 10. This organization notes that military spending increased by 6% in 2007 compared to 2006, and by 45% since 2008, and that it accounted for 2.5% of the Global Gross Domestic Product, or US\$ 202 per capita worldwide. Spain ranks 15th in terms of military spending, with military expenditures of 14.6 billion dollars that constitute 1% of the total amount spend worldwide.

¹²⁵⁹ Op.cit., Sharon Wiharta, Pages 7-8. There is no information about the cost of the 61 afore-mentioned peace processes which were primarily carried out by military parties. Furthermore, it is sometimes difficult to tell whether these operations were aimed at maintaining peace or at securing geostrategic military objectives. While serving in Sudan for the UNAMID, four Rwandan military officials were prosecuted in February 2008 (see footnote Nr. 20). Months later, on September 3, 2008 the US Department of State made a donation of military equipment worth US\$ 20 million to the Rwandan defense force led by one of the above-mentioned prosecuted officials, whose UN appointment in Sudan was, in fact, ratified by UN Secretary General a few weeks later and extended for an irrevocable 6-month period until March 2009. (see official information from the US Embassy in Rwanda: http://rwanda.usembassy.gov/u.s._embassy_donates_equipment_to_the_rwanda_defense_forces).

¹²⁶⁰ See Report of the Assembly of Member States of the International Criminal Court ICC-ASP/8/5 dated May 13 2009, http://www2.iccpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-5-ENG.pdf (June 4 2009 search).

¹²⁶¹ See official UN ICTR site: <http://www.ictor.org/ENGLISH/geninfo/index.htm>

Compared to military spending, this amount is clearly a drop in the bucket - even if we compare it to military spending in Spain which accounts for 1% of military expenditures worldwide¹²⁶².

Many scholars and experts on peace and peaceful conflict resolution continue urging for an increase and restructuring of private and public investment in favor of peace¹²⁶³. Investing in global peace processes is imperative. There are no studies which look at how much has been invested in theoretical analysis, research,¹²⁶⁴ infrastructure and the practical implementation of the different venues for peace-building worldwide. It took ages before a global criminal Court was created, and even now, it still needs to grow, become stronger and spread out around the world. We need to roll up our sleeves to establish a true Global Center for Peace and International Conflict Mediation. This center should be the outcome of an international agreement between the different countries of the world, have an adequate and sufficiently endowed budget¹²⁶⁵, and operate in a concerted effort with regional and global institutions, governments, public and private entities. It should be authorized to intervene within the framework of accredited international experts—governmental, non-governmental and independent-, work on the basis of multidisciplinary teams comprising people from different geographical, social, racial, ethnic, religious and intellectual backgrounds and viewpoints, and focus on preventing violent conflict and on solving and transforming conflict by peaceful means. We cannot wait for ages,

¹²⁶² This amount pales when compared even to weapon sales figures of leading North American weapon manufacturer Boeing which had a turnover of 30.69 billion dollars in 2006. Op. Cit, SIPRI, Page 12. See an other example: African Union-United Nations Hybrid Operation in Darfur (UNAMID) approved budget for \$1, 569.26 million (A/C.5/62/30) for financing that mission from July 2007 to June 2008 (see: <http://www.un.org/Depts/dpko/missions/unamid/facts.html>, June 4 2009 search). UNAMID was established by the Security Council, in resolution 1769 (2007) for an initial period of 12 months, to help achieve a lasting political solution and sustained security in Darfur. This budget provides for the deployment of 240 military observers, 19,315 military contingent, 3,772 United Nations police, 2,660 formed police units, 1,542 international staff, 3,452 national staff, 548 United Nations Volunteers and 6 Government-provided personnel. In addition, the budget includes 55 international and 30 national staff under general temporary service (see <http://www.un.org/News/Press/docs/2007/gaab3828.doc.htm>, June 4 2009 search).

¹²⁶³ See, as example, Anatol Rappoport, 1989.

¹²⁶⁴ See Escola de Cultura de Pau, 2008, Page 13. This study shows that most Spanish research centers do not reveal their budgets, but notes that the budget of four centers totaled 6 million euros.

¹²⁶⁵ To set it in motion, it would suffice that all countries contribute 0,1% of what they presently allot to military spending and earmark it to establish and authorize the first annual budget of this Global Center.

we cannot even wait for decades. We are jointly responsible for making it happen in the next decade for the sake of the earth and all present and future generations.

Sovereign excesses in the twentieth century resulted in the murder of approximately 170,000,000 persons by their sovereign.¹²⁶⁶ This statistic, a potent testimony of sovereign excesses through gross and systematic human rights violations, firmly places human rights and humanitarian problems on the international plane. This reality firmly mandates a fundamental rethinking about the basis of sovereignty's political and associational organization in the new millennium.¹²⁶⁷

Since the end of World War II, a body of international rights law has emerged that considers a government's treatment of its own citizens as a concern of international regulation instead of internal state prerogatives.¹²⁶⁸ No longer is state conduct immune from international scrutiny, or even from sanction. Mechanisms are being created through which "sovereign" conduct is held accountable to international norms without the ability simply to claim lack of continuing consent to those norms. This demonstrates that the nineteenth century notion of a second-tier social contract is no longer appropriate to the conduct of international relations.¹²⁶⁹ International criminal law runs directly to the individual. "It is therefore inevitable that states would regard egregious

¹²⁶⁶ R.J. Rummel, *Death by Government* 9 (New Brunswick: Transactions Publishers 1994).

¹²⁶⁷ See, e.g., United Nations, *Executive Summary, Report of the Secretary General's High-Level Panel on Threats, Challenges and Change* 1 (2004), available at <http://www.un.org/secureworld/brochure.pdf>, accessed December 20, 2004. The full report is available at <http://www.un.org/secureworld/report3.pdf>.

¹²⁶⁸ See generally Myres S. McDougal et al., *Human Rights and World Public Order The Basic Policies of an International Law of Human Dignity* 313-332 (New Haven: Yale University Press 1980); Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & CoMP. L. 47, 75-80 (1996).

¹²⁶⁹ In terms of a Lockean, second-tier social contract, sovereignty treats the relationship among states in forming the international order as parallel to the relationship among citizens in forming the order that is the state. The internationalization of the individual in the aftermath of World War II and his/her elevation from the subordinate status of an object of international law to a subject means that international law fractured the second-tier social contract structure by bringing first-tier social contract subjects directly into second-tier relationships and thus effectively placing the individual within the international legal framework.

violations of human rights as subject to individual criminal responsibility instead of only state liability." ¹²⁷⁰ Lynn S. Bickley extrapolates and substantiates this point thus:

Consistent with a sovereign responsibility to protect its citizens, the increasingly active role of the international community in human rights protection enhances rather than diminishes the notion of sovereignty. Although a nation sacrifices some sovereignty when it becomes a party to an international agreement, it also gains certain protections that broaden and enhance its sovereignty. The interdependence of the international community assists and fortifies sovereignty as the power of a nation to protect its citizens. ¹²⁷¹

Distinguished international law publicists recognize what they regard as the "inescapability of the concept of sovereignty as a quality of the state under present-day international law." ¹²⁷² They also recognize it as a "fundamental principle of the law of nations."¹²⁷³ However, even the strongest proponents of this positivist view of international law conditioned by sovereign states assert that international law strongly rejects the admissibility of absolute sovereignty as the basic principle of international law. ¹²⁷⁴ This article has as its modest aim a general overview of the role of the development of human rights and humanitarian norms in reshaping the content and contour of Westphalian sovereignty. ¹²⁷⁵

¹²⁷⁰ Lynn Sellers Bickley, *US. Resistance to the International Criminal Court: Is the Sword Mightier Than the Law?* 14 EMORY INT'L L. R. 213, 265 (2000).

¹²⁷¹ Bickley, *supra* note 5, at 261.

¹²⁷² Marek Stanislaw Korowicz, *Some Present Aspects of Sovereignty in International Law* (1961) 102 *Recueil Des Cours* 1-120; *but cf.* Arthur Larson et al., *Sovereignty within the Law* (Dobbs Ferry, New York: Oceana Publications 1965).

¹²⁷³ Korowicz and Larson et al., *supra* note 7.

¹²⁷⁴ Arthur Larson et al., *Sovereignty within the Law* (Dobbs Ferry, New York: Oceana Publications 1965). Surveys of the writings of diverse authors such as Korowicz, Larsen and Jenks indicate a clear repudiation of any absolutist notion of sovereignty implicit in the command theory of law and its progeny.

¹²⁷⁵ The modern independent Nation-State is founded upon a reverence of sovereignty emanated from the Peace of Westphalia of 1648 which ended the ward of religion between the Protestant and Catholic States.

CHAPTER 11

SOVEREIGN IMMUNITY IN CONTEMPORARY AGE OF HUMAN RIGHTS JURISPRUDENCE.

World War I was a watershed conflict. Apart from inaugurating total war, the end of the war saw an unsuccessful attempt to prise open the iron curtain of Westphalian sovereignty by individualizing criminal responsibility for violations of the emerging law of war. The punishment provisions of the peace treaties of Versailles and Sevres sought to limit the scope of the principle of sovereign immunity by punishing military and civilian officials, while at the same time extending universal jurisdiction to cover war crimes and crimes against humanity.

In a dramatic break with the past, and in a bid to build a normative foundation of human dignity, the chaos and destruction of World War I gave rise to a yearning for peace and a popular backlash against impunity for atrocity.

The war provoked criticism by many of both the outrageous behaviour by a government towards its own citizens (Turkey) and aggression against other nations (Germany). Both types of atrocity evoked demands for increased respect for humanity and the maintenance of peace.¹²⁷⁶

The devastation of the war provided a catalyst for the first serious attempt to crack the Westphalian notion of sovereignty. This dramatic new attitude was encapsulated in the enthusiasm for extending criminal jurisdiction over sovereign states, such as Germany and Turkey, with the aim of apprehension, trial and

Westphalian sovereignty enshrined the internal and external autonomy of the State. The accompanying sovereign tenets of political independence and territorial supremacy enshrined the State's freedom of action and unlimited use of power internally, forbidding and exercise of jurisdiction by any State over issues and individuals within another State's territorial boundaries thus precluding external interference and unsolicited intervention. See Jackson Maogoto, *International Criminal Law and State Sovereignty: Versailles to Rome I*

(New York:Transnational Publishers Inc. 2003)

¹²⁷⁶ Jackson Nyamuya Maogoto, *International Criminal Law and State Sovereignty: Versailles to Rome* 33 (Ardsley:Transnational Publishers 2003).

punishment of individuals guilty of committing atrocities through supranational trials.¹²⁷⁷

However the emerging commitment to human dignity was to be first derailed and then swept aside by resurgent nationalistic ambitions brewed in the cauldron of sovereignty and distilled by politics. The "iron curtain" of Westphalian sovereignty was the primary objection advanced by both Germany and Turkey, against Allied calls for the establishment of supranational tribunals to try the officials and personnel of these countries implicated in wartime atrocities. Both nations, in the light of these international efforts, strongly advocated against such a move, arguing that sovereignty over territory and authority over nationals, a sacrosanct principle of international law, was threatened if the proposed supranational tribunals proceeded.

The anticipated international penal process yielded to the demands of national sovereignty, which lead to sham national trials in Germany and Turkey after a major revision and scaling down of the defendant list in both countries. Subsequently, the German and Turkish regimes that gained power in the post-war era successfully relied on principles of national sovereignty to reject the authority of the European Powers to intervene in the domestic trials held in lieu of anticipated supranational trials.

While the envisaged international efforts to secure international criminal liability failed to materialize, important principles were established. Firstly, the 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties articulated crimes against humanity, and attempted to limit the previously solid conception of sovereign immunity that shielded Heads of State as well as officials from the reach of international law. Secondly, for the first time, the idea that the state did not hold exclusive criminal jurisdiction was challenged. Finally, the recognition of the need of international penal institutions to repress violations of international criminal law in the face of state recalcitrance

¹²⁷⁷ The peace treaties of Versailles and Sevres envisaged liability for individuals even if their crimes were committed in the name of their states.

questioned the state's exclusive right to legal competence over management of its affairs.

It took the Second World War, about two decades later, to spur states into giving international criminal law life and vitality. The surge of moral unrest over the unlimited right of states to go to war whenever they wanted to, coupled with political and economic chaos, provided the basis for focusing on international accountability through penal process. It was at the post-World War II trials at Nuremberg (and later at Tokyo) that the iron curtain of sovereignty was dramatically drawn back. The post-World War II trials were designed to change the anarchic context in which nations and peoples of the world related to one another. The rejection of "obedience to superior orders", "acts of state" and "sovereign immunity" for the first time exposed the state to inquiry into its freedom of action and law-making competence.

The Nuremberg and Tokyo trials are the visible symbol of the transition from the classical Westphalian system of state sovereignty to an international system based on the credo of "common interest" that surfaced in the middle of the last century. In a sense these trials represent the foundation of modern thinking about international law, with an emphasis on the maintenance of peace and the responsibility of the state and its officials to international standards. The Nuremberg and Tokyo trials of major war criminals were a landmark event in the development of international law. Besides infusing international law with fundamental moral principles in a manner not seen for centuries and giving birth to the modern international law of human rights, the trials also gave clear notice to the nations of the world that claims of absolute sovereignty must hereafter yield to the international community's claim on peace and justice.

Nuremberg and Tokyo marked a paradigmatic shift from the externalisation of domestic norms under the statist Westphalian system of sovereignty to an international system determined to internalize international norms within the national sphere. It was at these post-World War II trials that unabashed claims of national sovereignty, stimulated by the nation-state system recognized at

Westphalia, were subjected to the test of international standards and universalist claims for peace and the sanctity of human rights. For the first time in history, at Nuremberg and later Tokyo, individuals who had abused power in violation of international law were held to answer in international courts of law for crimes committed during war in the name of their state. The Nuremberg judgment (echoed subsequently by the Tokyo judgment) clearly brought crimes against humanity from the realm of vague exhortation into the domain of positive international law. This generated the idea that grave and massive violations of human rights can become the concern of the international community, not just that of the individual state.

The decision by the Allies at the end of World War II to try major war criminals for violations of international law was a turning point in modern history concerning the relationship between individuals and international law.¹²⁷⁸ The lesson of Nuremberg, echoed at Tokyo, was that never again would atrocities in war or peace be carried out with impunity and that the world was determined to bring to account, individuals who carried out massive and heinous atrocities against other warring parties and civilians. The Nuremberg tribunal was not merely to establish that the rules of public international law should and do apply to individuals; it was also intended to demonstrate that the protection of human rights was too important a matter to be left entirely to states. This proposition was earlier enshrined in the Preamble and Article 55 of the United Nations ("U.N.") Charter.¹²⁷⁹

The post-World War II trials were a pivotal event in international law. In some ways they marked a return to venerable doctrines of natural justice that had fallen into disuse and disfavour with the rise of legal positivism starting in the eighteenth century. Naturalistic doctrines were resurrected and infused into the

¹²⁷⁸ Mark WJanis, *An Introduction to International Law* 246 (Boston: Little Brown 1993).

¹²⁷⁹ The *UN. Charter* was signed on June 26, 1945 (and entered into force on October 24, 1945). Shortly after the San Francisco Conference which gave birth to the U.N., representatives of the four Major Allied Powers (Great Britain, France, the U.S.S.R. and the U.S.) met in London on 26 June 1945 to negotiate on the law and procedures according to which the Nazi leaders ought to be prosecuted, tried and punished resulting in the adoption of the *Nuremberg Charter* on August 8, 1945.

new thought and philosophy that was behind the decision to hold the trials. The belief in natural law helped to ensure that the tribunals would apply international law in the interests of fundamental moral values. This reversed the nineteenth century trend (the heyday of legal positivism), during which natural law lost much ground as positivism gained sway and infused international law with the agenda of maximising state sovereignty and cutting back concerns with following any fundamental precepts of morality.

The significance of the post-World War II trials is captured by Justice Robert H. Jackson, Chief Prosecutor at Nuremberg. Writing in 1949, he described the Nuremberg international trials as the twentieth century's most "definite challenge" to the "anarchic concepts of the law of nations."¹²⁸⁰ He argued that Nuremberg was the first step towards limiting the unfettered discretion of sovereign states to resort to armed force.¹²⁸¹ Government officials could no longer credibly claim legal immunity based upon the act of state and superior orders defenses.¹²⁸² Jackson noted that international institutions were so undeveloped and in decline that, absent the Nuremberg trial, it is unlikely that these "catastrophic doctrines" would have been challenged and modified.¹²⁸³

11.1 THE COLD WAR: A NOBLE CRUSADE IN STORMY WATERS?

The "*internationalization*" of the legal status of the human being became one of the most prominent features of the post-World War II period after the Nazi and fascist violations of elementary human rights.¹²⁸⁴ The post-World War II era was a period in which the freedom and independence of the state in law-making was subjected to limitations by international law in respect of certain international interests. What had been unthinkable before World War II became

¹²⁸⁰ Robert H. Jackson, *Nuremberg in Retrospect. Legal Answer to International Lawlessness*, 35 A.B.A J. 813 (1949).

¹²⁸¹ *Id.*

¹²⁸² *Id.*

¹²⁸³ *Id.* at 813-814.

¹²⁸⁴ See Professor Bedjaoui's general introduction in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects* 13 (Paris: UNESCO Publishing/ Martinus Nijhoff Publishers 1991).

commonplace. The dozens of human rights and humanitarian instruments adopted after the post-World War II trials are based on the premise that sovereign states are not free to abuse their own citizens with impunity. The instruments are designed to secure adherence to the international human rights, recognized at the post World War II international trials. Besides demonstrating that legal values arising from international law impose obligations directly on the state, these instruments are a sign that the citizen is not subject only to the dictates of the national sovereign but a subject of the dictates of international law as well. Even as international human rights and humanitarian law instruments marked the important steps by the international law to limit sovereignty, the Cold War was to tie the issue of sovereignty to ideological and revolutionary agendas. The world experienced the third struggle for hegemonic domination of the twentieth century hot on the heels of the conclusion of the second. The U.S.S.R. increasingly saw the notion of "restriction of sovereignty" and the conceptions of "common interest" and "common good" as nothing more than a diplomatic screen hiding the predatory aims of western imperialist powers.¹²⁸⁵ Coupled with this stance by one of the world's only two superpowers was the outcome of the decolonisation and self-determination process which saw a radical increase in internationally recognized claims to national state sovereignty. Vast numbers of newly independent sovereign states were weak in terms of national integration and foreign relations. This led to widespread reification of sovereignty in the vast numbers of newly independent states, justified under the internal affairs domestic jurisdiction clause of the U.N. Charter.¹²⁸⁶ These states sought to claim widespread immunity from international duties and obligations (especially in the human rights sphere) and expanded sovereign rights as a form of compensation for the wrongs of colonial-imperialist exploitation and hegemony. The net effect of these factors was to strengthen sovereignty considerations, as the U.N. became a ground for cultivating the agenda of nationalism brought to the fore with the appearance of the "Third World" as a force in the years after World War II.

¹²⁸⁵ See, e.g., I. E. Korovin, *Respect for Sovereignty. An Unchanging Principle of Soviet Foreign Policy* Int'l Affairs (Moscow) 11, 32, 37-9 (1956).

¹²⁸⁶ *UN. Charter*, *supra* note 13, art. 2(7).

With sovereignty viewed as a vital element of global international society, the power politics of the Cold War era served to curtail the expected benefits from the limitation of sovereignty articulated at the post-World War II trials. Consequently, an increasingly evident contradiction in the Cold War appeared. International law continued to pursue its original, and still topical, ambition which is to regulate the relations between states in their international dimensions while at the same time tending more and more to defer to the municipal dimension of states and their domestic affairs. The interpenetration between international dimensions and national aspects in inter-state relations, against a background of rivalries in a divided world, was a feature of the Cold War that threatened to expand and strengthen state sovereignty, which had undergone a major battering at the Nuremberg and Tokyo trials.

The Cold War largely put an end to the spurt of international judicial activity inaugurated at Nuremberg and Tokyo and contributed to the preservation of a statist international order. Many states were reluctant to enthusiastically embrace any form of international penal process and displayed a great deal of ambivalence in the normal conduct of their foreign affairs. Though a series of conflicts in the Cold War era set the arena for violations of international criminal law, the lack of a systematic international enforcement regime contributed to the lack of respect for the legitimacy of the international justice and even to a degree of cynicism about it. With lack of state cooperation, the blood-soaked Cold War era was characterized by impunity. The ad hoc international criminal tribunals in the 1990s represented an international effort to put in place an international enforcement regime, the lack of which had helped ensure impunity during the Cold War era. The War Crimes and Crimes against Humanity Courts at Nuremberg were the forerunners at the heart of the United Nations Security resolutions of the 1990s, which created the two ad hoc international criminal tribunals.

11.2 POST-COLD WAR: OLD SOVEREIGNTY, NEW SOVEREIGNTY

The creation of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda raised questions concerning the appropriate relationship between these international ad hoc penal institutions and national courts. This is in view of the fact that traditionally sovereignty over territory and authority over nationals are two of the most basic aspects of statehood, and therefore the territorial and nationality principles are more fundamental than other competing principles of jurisdiction. While the statutes of the ad hoc international criminal tribunals recognize that national courts have concurrent jurisdiction, they clearly assert the primacy of the international tribunals, an extraordinary jurisdictional development. Though states, by definition, have international independence, "combined with the right and power of regulating [their] internal affairs without foreign dictation,"¹²⁸⁷ the weakening of its denotation of full and unchallengeable power over territory and all the persons therein, is illustrated by the establishment of the two ad hoc international criminal tribunals. It was not lost on the 'international community that concessions to the ideals of international justice were a necessity. This was in order to create effective international mechanisms necessitating trumping the wishes of many states insisting upon preserving the totality of their sovereign prerogatives.

The new balance achieved between the jurisdiction of national courts and that of the ad hoc international criminal tribunals marks the end of an era when the exercise of criminal jurisdiction fell within the unfettered prerogatives of the sovereign state. The Security Council created each of the two existing international criminal tribunals ad hoc as an extraordinary response to a specific and narrowly defined threat to international peace and security. To enable them to address these threats, it granted them unprecedented primacy over the jurisdiction of all national courts. The practice and application of primacy, in both the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), foreshadowed the political and legal disputes over the creation of a permanent International Criminal Court

¹²⁸⁷ Black's Law Dictionary 971 (abridged 6th ed., 1993).

("ICC") and the possible contours of its jurisdiction during the Rome Diplomatic Conference.

The dilemma of building agreement among state parties without diluting core principles essential to an effective international penal regime coloured the Rome conference.¹²⁸⁸ The process of making the Rome Statute was a battleground for supranational and international regimes. The challenge was the need for a trade-off between achieving consistency and building a consensus. This was arguably more pronounced because the state was being called upon to reconfigure certain key aspects of its domestic jurisdiction as well as state crafted international regimes in favour of a functioning international regime.¹²⁸⁹ Consultations, consensus and compromise were at the heart of the Statute making process.¹²⁹⁰

The Rome Statute embodies a carefully created compromise between a state centred idea of jurisdiction, and a more inclusive international vision. In its extreme manifestation, the state centred idea would uphold a state's exclusive jurisdiction to prosecute and try its own citizens for war crimes, genocide, crimes against humanity, and to prosecute citizens of other states who commit such acts on the territory of the forum state. An inclusive vision would promote the idea of universal jurisdiction, whereby individuals of any nationality could be tried for certain crimes by any state acting on behalf of humanity as a whole. The ICC follows a middle path. The Rome Statute assigns primary jurisdiction to the ICC's Member states. However, in ratifying the Rome Statute and becoming members of the ICC, states agree that, if they are unwilling or unable to carry out their

¹²⁸⁸ Chimene Keitner, *Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)* 6 UCLA J. Int'l L. & Foreign Aff. 215,271 (2001).

¹²⁸⁹ *Id.*, at 215.

¹²⁹⁰ In the articulate encapsulation of this triad, Professor M Plachta states:

Triple "C" was a dominant tone at the Conference. Consultations-Consensus-Compromise describes both the organisational framework and the tools that were adopted at the Conference. While the first element is procedure-oriented, the last two are result-oriented, with one important distinction between them. The second component sets the threshold, whereas the third determines the contents of the final result. The first two elements out of this triad facilitate and encourage achieving the last one. That compromise will be a matter of "life and death" became apparent at the very beginning of the Conference, when the delegates started presenting their positions specified in instructions from their capitals.

Michael Plachta, *Contribution of the Rome Diplomatic Conference for the Establishment of the ICC to the Development of International Criminal Law* 5 U.C. Davis J. Int'l L. & Pol'y 181, 186-187 (1999).

obligation to investigate and prosecute these crimes, the ICC has "complementary" jurisdiction to do so in their stead.

The ICC will provide an indispensable backup to national jurisdictions in deterring, investigating, and prosecuting serious international crimes. The momentum behind the ICC testifies to the increasing realisation by countries that international norms may require international enforcement mechanisms, especially where individual perpetrators beyond the reach of their own domestic courts are concerned. The frequent observation that an individual who commits one murder may face life imprisonment, but another who murders thousands may enjoy impunity, has driven efforts to rectify this incongruity, especially insofar as it constitutes a by-product of an international system of sovereign states.¹²⁹¹ The ICC will eliminate the need to create additional ad hoc international tribunals when domestic legal systems lack the will or ability to investigate and prosecute these crimes themselves.

A *An Ageing Ideology Facing a New Reality*

Sovereignty has several basic difficulties- some conceptual, and some of an empirical nature. From a conceptual point of view, the term has contradictory characteristics of being both reified and porous.¹²⁹² All too often though, the sovereignty doctrine is an "impenetrably rigid juridical artefact as states incant the ritual of brooking no interference with their internal affairs."¹²⁹³ The constitutional position of the existing ad hoc international criminal tribunals, as well as the international criminal court, is instructive. The common interest of sovereign entities is better protected when exclusive parochial interests of reified sovereignty are bypassed in the interests of mankind. The basis for this is through mapping and locating sovereignty more precisely within the context of

¹²⁹¹ Signing, ratifying, and implementing the ICC provides states with an opportunity to review their existing criminal procedures, and to ensure that these comport with international standards such as those relating to due process, the protection of victims and witnesses, and jurisdiction over internationally recognised crimes.

¹²⁹² Operational constitutions often exhibit the characteristics of being reified and porous at the same time.

¹²⁹³ Winston P Nagan, *Strengthening Humanitarian Law: Sovereignty International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia*, 6 Duke J. Comp. & Int'l L. 127,137-143 (1995).

global power and constitutive processes. Professor Winston Nagan postulates that:

To strengthen the conceptual and doctrinal basis of humanitarian law we must purge the sovereignty precept of the conceptual and normative confusion it generates. We need more precision about the nature of the specific problems in which sovereignty is invoked as a sword or a shield, a clearer perception of the common and special interest it sometimes seeks to promote, protect or compromise, and a clearer delineation of its precise role in the constitutional order and promise of the UN Charter. We must map and locate sovereignty more precisely within the context of global power and constitutive processes.¹²⁹⁴

Since the end of the Cold War, international law has come to recognize the permissibility of intervention in circumstances other than in response to a nation's external acts of aggression. This growth has focused primarily on the violation of basic human rights norms as a basis for intervention. Current consensus indicates that a state's violation of its citizens' most basic rights may permit intervention into its affairs. Indeed, "international law today recognizes, as a matter of practice, the legitimacy of collective forcible humanitarian intervention, that is, of military measures authorized by the Security Council for the purpose of remedying serious human rights violations."¹²⁹⁵

State sovereignty, which for centuries was conceptualized as "the absolute power of the state to rule,"¹²⁹⁶ has opened up by recognition that the state may be responsible for a breach of certain international obligations. Among these obligations, a state must provide for the general safety of the human person and may not permit widespread human rights violations against its citizens, such as

¹²⁹⁴ *Id.*, at 146.

¹²⁹⁵ Fernando R. Tesón, *Changing Perceptions of Domestic Jurisdiction and Intervention*, in *Beyond Sovereignty: Collectively Defending Democracy in the Americas* 29 (Tom Farer ed., Baltimore: The John Hopkins University Press 1996).

¹²⁹⁶ Kriangsak Kittichaisaree, *International Criminal Law* 5 (Oxford: Oxford University Press 2001).

the commission of genocide, crimes against humanity, slavery, and apartheid.¹²⁹⁷ Though state responsibility and individual criminal responsibility are separate concepts under international law,¹²⁹⁸ a state that undertakes the prosecution of a foreign citizen for crimes committed in a foreign state assumes that state's domestic jurisdiction. In this regard, the author concurs with Anthony Sammons conclusion that:

...the valid assertion of universal jurisdiction as the sole basis for the prosecution of international crimes requires a conclusion that the State of the perpetrator's nationality, or of the crime's commission, either has breached or failed to enforce its international obligations to such a degree that partial assumption of its domestic jurisdiction is permissible.¹²⁹⁹

Sammons postulation is especially relevant in view of the fact that classical Westphalian sovereignty hinders the development of a more rational approach to the international, constitutional allocation of competence in controlling and regulating criminal behaviour that requires effective international community intervention. Further elaboration of Sammons's view is encapsulated in Professor Nagan's concise observation that:

From an operational perspective, the practical question generally has been how far a State may go in establishing the external reach of its criminal jurisdiction under international law. The phrase "under international law" suggests some accommodating prudential limit of the reach of a state's competence from the perspective of other States whose interest may be compromised when a State allocates for itself the right to try the nationals of other States under its own criminal justice standards.¹³⁰⁰

¹²⁹⁷ *Id.*, at 7 (citing art 19, §3(c) of the Draft Articles on State Responsibility).

¹²⁹⁸ *Id.*, at 9.

¹²⁹⁹ Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction :Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 Berkeley J. Int'l L. 111,115 (2003).

¹³⁰⁰ Nagan, *supra* note 27, at 137.

The destructive impact of massive and systematic human rights violations impinges directly on important world order values which no state has dared suggest are not common and shared. If human rights are considered serious values and matters of international concern, effective policing is required from local to global levels in the name of the world community as a whole.¹³⁰¹ A complete denial of the principles of human rights and humanitarian law, especially when grave breaches of that law are involved, represents a rejection of fundamental human rights precepts. This may point to an alternative normative order that essentially disparages the basic principle of human dignity.

Though sovereignty in the external or international context continues to be strong, it is not as absolute as its definition suggests.¹³⁰² No state, however powerful, has been able to shield its affairs completely from external influence.¹³⁰³ "Although sovereignty continues to be a controlling force affecting international relations, the powers, immunities and privileges it carries have been subject to increased limitations."¹³⁰⁴ These limitations often result from the need to balance the recognized rights of sovereign nations against the greater need for international justice.¹³⁰⁵

Since one of the main roles of a sovereign state is to provide security and protection for its own people.¹³⁰⁶ The author concurs with McKeon's view that a state forfeits its sovereignty when its actions are universally condemned.¹³⁰⁷ From a legal perspective, each instance of enforcement serves to legitimize

¹³⁰¹ *Id.*, at 145-146.

¹³⁰² See Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 Denv.J. Int'l L. 419,432 (1995) (asserting that notion of absolute sovereignty is 'no longer tenable'); see also W Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 866-869 (1990).

¹³⁰³ See J. L. Brierly, *The Law of Nations* 48-50 (4th ed., Oxford: Clarendon Press 1949) (finding problems with implication that sovereignty exempts states from being subject to international law).

¹³⁰⁴ See Ronald A. Brand, *External Sovereignty and International Law*, 18 Fordham Int'l L. J. 1685,1695 (1995).

¹³⁰⁵ Patricia A. McKeon, *An International Criminal Court: Balancing The Principle of Sovereignty Against The Demands For International Justice*, 12 St. John's J. Legal Comment 535,541 (1997).

¹³⁰⁶ See Brand, *supra* note 38, at 1696 (describing sovereign state's obligation to protect and provide security for its citizens).

¹³⁰⁷ See generally Michael Ross Fowler & Julie Marie Bunck, *Law, Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* 41-45 (University Park, PA.: Pennsylvania State University Press 1995) (explaining that sovereign state's failure to protect its inhabitants is tantamount to transferring its sovereign power to one who will).

norms of international criminal law. These norms reflect a collective judgment by all countries that certain acts are by their very nature criminal. The enforcement of criminal law is innately tied to a nation's sovereignty and it can be argued that by enforcing international criminal law governments are not ceding sovereignty but instead are exercising sovereignty.

... if the role of the sovereign is to provide security for its subjects, and effective means present themselves for increasing security through international law, then the role of the sovereign must be to participate in the development of that law. It is not an abdication of sovereign authority to delegate functions and authority to a global system of law; it is in many cases an abdication of that authority not to do so.¹³⁰⁸

If international law is to be relevant in the twenty-first century, it must acknowledge the principal social contract focus on the relationship between the citizen and the state for purposes of defining sovereignty in both national (internal) and international (external) relations. In place of a social contract of states, this redefinition of sovereignty recognizes that international law has developed direct links between the individual and international law. Consequently, an active role on the part of the international community in promoting human rights and humanitarian norms is consistent with a sovereign's responsibility to protect its people, and enhances rather than detracts from this notion of sovereignty.¹³⁰⁹ Patricia McKeon notes that:

Although a nation cedes some sovereignty when it becomes a party to an international agreement, it also receives certain protections which broaden its sovereignty. If sovereignty is viewed as the power of a nation to protect its citizens, as it should, fortifying itself

¹³⁰⁸ Brand, *supra* note 38, at 1696.

¹³⁰⁹ See M. M. MARTIN Martinez, *National Sovereignty and International Organizations* 66 (The Hague: Kluwer Law International 1996); Nancy Arniston, *International Law and Non- Intervention: When Do Humanitarian Concerns Supersede Sovereignty?*, 17 Fletcher Forum of World Affairs 199, 207 (1993).

with the aid of the international community only enhances this objective.¹³¹⁰

McKeon's observation is echoed and amplified by the Report of the Secretary General's High-level Panel on Threats, Challenges and Change.

The Report firstly endorses the emerging norm of a *responsibility to protect* civilians from large-scale violence, a responsibility that is held, first and foremost, by national authorities.¹³¹¹ It however, goes on to note that:

When a State fails to protect its civilians, the international community then has a further responsibility to act, through humanitarian operations, monitoring missions and diplomatic pressure-and with force if necessary, though only as a last resort. And in the case of conflict or the use of force, this also implies a clear international commitment to rebuilding shattered societies.¹³¹²

Support for the Report is found in the reality that the U.N. Charter is part of a world constitutional instrument and hence the formal basis of an international rule of law. One of the Charter's primary purposes is to constrain sovereign behaviours inconsistent with its key precepts. Professor Nagan notes that: "The term 'sovereignty' in the UN Charter is most visible in the context of sovereign equality."¹³¹³ However he goes on to observe that: "Outside this context, the term is rarely used in the text of the Charter. Indeed, Charter Article 2(7) uses the term 'domestic jurisdiction' as a precept that seems intentionally less inclusive than the term 'sovereign' suggests."¹³¹⁴ This particular interpretation provides the basis for the author to contend that it seeks to demonstrate de-linkage of the external nature of sovereignty from its internal contours and thus shed the all-encompassing conception that is frequently and regularly attributed to

¹³¹⁰ McKeon, *supra* note 39, 542-43.

¹³¹¹ Report of the Secretary General's High-level Panel on Threats, Challenges and Change, *supra* note 2, at 4.

¹³¹² *Id.*, at 4.

¹³¹³ Nagan, *supra* note 27, at 146.

¹³¹⁴ *Id.*, at 146.

Wesphalian sovereignty. "Commentaries that disregard state sovereignty as an eradicable hindrance to denationalization fail to recognize the possible benefits to be gained by simply redrawing the balance between sovereignty's empowering and limiting aspects."¹³¹⁵

Recent international legal theory supports the view of sovereignty as an "allocation of decision-making authority between national and international legal regimes."¹³¹⁶ A state's total "bundle" of sovereign rights remains extensive, as sovereignty remains the pre-emptive international norm. However, the international legal regime obligates all states to maintain a minimum standard of observation of human rights. By the existence of this minimum standard, international law imposes obligations which a state must meet continuously in order to maintain legitimacy under the international system. Elaborating on this new sovereignty reconceptualisation, Kurt Mills asserts that:

[A state's] rights and obligations come into play when a State, or at least certain actions of a State, has been found to be illegitimate within the framework of the New Sovereignty. That is, when a State violates human rights or cannot meet its obligations vis4-vis its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular situation, which may involve ignoring the sovereignty of the State in favour of the sovereignty of individuals and groups.¹³¹⁷

The significance of the assertion above is captured in Sammons observation that: "when a state instigates or acquiesces in the commission of serious violations of international human rights and humanitarian norms, it exceeds its

¹³¹⁵ John R. Worth, *Globalization and the Myth of Absolute National Sovereignty. Reconsidering the "Un-Signing" of the Rome Statute and the Legacy of Senator Bricker*, 79 IND. L.J. 245,261 (2004).

¹³¹⁶ Gregory H. Fox, *New Approaches to International Human Rights*, in *State Sovereignty: Change and Persistence in International Relations* 107 (Sohail H. Hashimi ed., University Park: Pennsylvania State University Press 1997).

¹³¹⁷ Kurt Mills, *Human Rights in the Emerging Global Order.'A New Sovereignty?* (Great Britain: MacMillan Press 1998) 163-164.

allocation of authority as a matter of law.”¹³¹⁸ Sammons goes on to note that this position recognizes that a state's sovereign rights with "regard to the internal treatment of its population are not absolute and, by implication, states are subject to international oversight.”¹³¹⁹ It would appear, that the evolution of sovereignty and the increasing need for international justice have now converged. This in turn means that the future development of international criminal law hinges upon the continuing evolution of this paradigm.

When Sulaiman Al-Adsani traveled from the United Kingdom to Kuwait to repel Saddam Hussein's invasion in 1991, he never dreamed he would depart with bruises and burns inflicted by the very government he had sought to defend. According to Al-Adsani, his troubles began when he was accused of releasing sexual videotapes of Sheikh Jaber Al-Sabah Al-Saud Al- Sabah, a relative of the emir of Kuwait, into general circulation. After the first Gulf war, with the aid of government troops, the sheikh exacted his revenge by breaking into Al-Adsani's house, beating him, and transporting him to a Kuwaiti state prison, where his beatings continued for days. Al-Adsani was subsequently taken at gunpoint in a government car to the palace of the emir's brother, where his ordeal intensified. According to Al-Adsani, his head was repeatedly submerged in a swimming pool filled with corpses and his body was badly burned when he was forced into a small room where the sheikh set fire to gasoline-soaked mattresses.

Following his return to the United Kingdom, Al-Adsani brought suit against the government of Kuwait in England's High Court seeking damages for the physical and psychological injury that had resulted from his alleged ordeal in Kuwait. The court dismissed the suit for lack of jurisdiction, holding that Kuwait was entitled to foreign state immunity under the UK State Immunity Act, 1978. Al-Adsani then appealed the decision to the English Court of Appeal but again lost on grounds of state immunity.

¹³¹⁸ Sammons, *supra* note 33, at 121.

¹³¹⁹ *Id.*, at 122.

After Al-Adsani was refused leave to appeal by the English House of Lords, he filed an application with the European Court of Human Rights (ECHR), arguing principally that the United Kingdom had failed to protect his right not to be tortured and had denied him access to legal process. Al-Adsani again lost, but he convinced many of the Court's judges to advocate an increasingly popular legal theory, the "normative hierarchy theory," aimed at challenging seemingly unjust outcomes such as these. Under the normative hierarchy theory, a state's jurisdictional immunity is abrogated when the state violates human rights protections that are considered peremptory international law norms, known as *jus cogens*. The theory postulates that because state immunity is not *jus cogens*, it ranks lower in the hierarchy of international law norms, and therefore can be overcome when a *jus cogens* norm is at stake. The normative hierarchy theory thus seeks to remove one of the most formidable obstacles in the path of human rights victims seeking legal redress.

The recent emergence of the normative hierarchy theory on the international law scene has sparked significant controversy among jurists and publicists. The ECHR's treatment of the issue in *Al-Adsani v. United Kingdom* exemplifies the spirited debate. While recognizing that the prohibition of torture possesses a "special character" in international law, the ECHR rejected the view that violation of such a norm compels denial of state immunity in civil suits. However, the verdict evoked opposing commentary on the normative hierarchy theory from various ECHR judges. On the one side, Judges Matti Pellonpää and Nicolas Bratza concurred with the decision and renounced the theory on practical grounds. They reasoned that if the theory were accepted as to jurisdictional immunities, it would also, by logical extension, have to be accepted as to the execution of judgments against foreign state defendants, since the laws regarding execution, like state immunity law, are arguably not *jus cogens* either. Consequently, acceptance of the normative hierarchy theory might lead to execution against a wide range of state property, from bank accounts used for

public purposes to real estate and housing for cultural institutes, threatening “orderly international cooperation” between states.

On the other side, Judges Christos Rozakis, Lucius Caflisch, Luzius Wildhaber, Jean-Paul Costa, Ireneu Cabral Barreto, and Nina Vajie dissented and advocated resolution of the case on the basis of the normative hierarchy theory. They wrote: “The acceptance... of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.” Thus, the minority concluded that Kuwait could not “hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction.”

The difference of opinion in the *Al-Adsani* case foreshadows the coming theoretical clash regarding the most appropriate and effective means of enforcing human rights law against foreign states in national proceedings. Since its inception just over a decade ago, the normative hierarchy theory has amassed notable support among scholars and jurists alike. Despite its growing popularity, however, the theory has never been comprehensively tested. To attempt to fill this void, this article offers a critical assessment of the normative hierarchy theory and concludes that the theory is unpersuasive because it rests on false assumptions regarding the doctrine of foreign state immunity.

The doctrine of foreign state immunity, like most legal doctrines, has evolved and changed over the last centuries, progressing through several distinct periods. The first period, covering the eighteenth and nineteenth centuries, has been called the period of absolute immunity, because foreign states are said to have enjoyed complete immunity from domestic legal proceedings. The second period emerged during the early twentieth century, when Western nations adopted a restrictive approach to immunity in response to the increased participation of state governments in international trade. This period was marked by the

development of the theoretical distinction between *acta jure imperii*, state conduct of a public or governmental nature for which immunity was granted, and *acta jure gestionis*, state conduct of a commercial or private nature for which it was not. This distinction rested on the growing notion that the exercise of jurisdiction over *acta jure gestionis* did not affront a state's sovereignty or dignity. Since applying the public/private distinction proved difficult for many courts, some states, particularly the common-law countries, developed a functional variation on the restrictive approach in the 1970s and 1980s, replacing that hazy distinction with national immunity legislation.

One of the more vexing topics in international law, state immunity is fraught with complexity and uncertainty, which the normative hierarchy theory does not adequately address. The theory operates conceptually on the international law level, as one norm of international law, *jus cogens*, trumps another, state immunity, because of its superior status. The theory thus assumes that state immunity in cases of human rights violations is an entitlement rooted in international law, by virtue of either a fundamental state right or customary international law. However, both assumptions are false. State immunity is not an absolute state right under the international legal order. Rather, as a fundamental matter, state immunity operates as an exception to the principle of adjudicatory jurisdiction. Moreover, while the practice of granting immunity to foreign states has given rise to a customary international law of state immunity, this body of law does not protect state conduct that amounts to a human rights violation. These realities yield the important conclusion—one that the normative hierarchy theory ignores—that, with respect to human rights violations, the forum state, not the foreign state defendant, enjoys ultimate authority, by operation of its domestic legal system, to modify a foreign state's privileges of immunity.

This article, while critiquing the normative hierarchy theory, establishes a solid theoretical foundation on which human rights litigation can proceed. The theory of restrictive immunity, adopted by most states, draws the line between immune

and nonimmune state conduct roughly in accordance with the public (imperii)/private (gestionis) distinction. However, the original aim of state immunity law was to enhance, not jeopardize, relations between states. This article contends that international law requires state immunity only as to state activity that collectively benefits the community of nations. Thus, where state conduct is clearly detrimental to interstate relations but still protected by domestic state immunity laws, the restrictive approach is inconsistent with the strictures of international law and should be amended. The most obvious example of this kind is where state immunity bars claims against a foreign state brought in a forum state for the murder, torture, or victimization of citizens of the forum state. In such circumstances, foreign states are afforded immunity protections solely as a matter of domestic law and their entitlement to immunity is revocable on the basis of the forum state's right to exercise adjudicatory jurisdiction over the dispute.

Some have observed that the doctrine of foreign state immunity is poised on the cusp of another period of doctrinal development—one in which a further restriction of immunity will accrue in favor of human rights norms. Such an advancement is welcome. However, it should proceed not on the basis of the normative hierarchy theory, which fails to reflect the true nature and operation of the doctrine of foreign state immunity, but, rather, on the basis of a theory of collective benefit in state relations.

The normative hierarchy theory proceeds on the assumption that state immunity in cases of human rights violations is an entitlement of states that derives from international law. Indeed, the centerpiece of the theory is a proposed hierarchy of international legal norms, which resolves the conflict between *jus cogens* and state immunity in favor of the former. This hierarchy, quite clearly, operates on a purely international level under the theory that the core interests of the community of states, enshrined in *jus cogens*, outweigh the individual interests of any one state, i.e., immunity from foreign domestic proceedings. As at present

there is no universally accepted multilateral treaty to govern state immunity law, the normative hierarchy theory must rest on the assumption that state immunity is either the product of a fundamental principle of international law—a principle that arises from the very structure of the international legal order—or a rule of customary international law.

11.3 STATE IMMUNITY AND FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW

The original conflict of principles. The doctrine of foreign state immunity was born out of tension between two important international law norms—sovereign equality and exclusive territorial jurisdiction. The United States Supreme Court’s decision in *The Schooner Exchange v. McFaddon*, widely regarded as the first definitive statement of the doctrine of foreign state immunity, presents the classic example of this theoretical conflict. In 1812, while sailing off the American coast, a commercial schooner, the *Exchange*, owned by two citizens of Maryland, was seized by the French navy. By general order of the emperor Napoleon Bonaparte, the French navy converted the schooner into a ship of war. When bad weather forced the *Exchange* into the port of Philadelphia, the original owners brought an *in rem* libel action against the ship for recovery of their property. The French government resisted the action, arguing that, as a ship of war, the *Exchange* was an arm of the emperor and was thus entitled to the same immunity privileges as the emperor himself.

On appeal to the Supreme Court, Chief Justice John Marshall identified the theoretical dilemma at issue. On the one hand, he observed, international law dictated that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute.” According to this long-established principle, the moment the *Exchange* entered U.S. territorial waters off the eastern seaboard, it became subject exclusively to the national authority of the U.S. government, an authority that encompassed the U.S. district court’s initiation of adverse legal

proceedings against it. On the other hand, Justice Marshall took notice of another fundamental principle of international law: that the world is composed of distinct nations, each endowed with “equal rights and equal independence.” This principle of sovereign equality, he believed, discouraged one sovereign from standing in judgment of another, coequal sovereign’s conduct. If the Exchange had been converted, as the French government argued, into an arm of the French emperor (and was thus a direct extension of his sovereignty), then the United States, as France’s equal under international law, would be remiss in adjudging the ship’s ownership through its courts. International law thus appeared simultaneously to grant the United States authority to adjudicate a dispute over property present within its territory and to prohibit the exercise of this jurisdiction because that property now purportedly belonged to a foreign government.

The conflict of principles in *The Schooner Exchange* resulted directly from what Sompong Sucharitkul has described as “a concurrence of jurisdictions... over the same location or dimension.” Normally, the principles of territorial jurisdiction and sovereign equality work individually-and often collectively-to promote order and fairness in the international legal system. The former serves to delineate each state’s authority to govern a distinct geographical area of the world, while the latter guarantees to all states, regardless of size, power, or wealth, equal capacity for rights under international law. In *The Schooner Exchange*, however, these principles were at odds because two nations, the United States and France, asserted their sovereign “jurisdiction,” or authority, to settle the dispute over the ship’s ownership. The United States claimed the right to exercise jurisdiction because of the physical presence of the schooner in U.S. territory. France, in stark contrast, argued that the conversion of the schooner fell within the ambit of the emperor’s power and thus, by virtue of its sovereign character, could not be reviewed in U.S. courts.

This clash of authority-and, in turn, that of the associated international law principles-is not confined to facts, such as those in *The Schooner Exchange*, that involve the straightforward transfer of sovereign property, such as a ship of war, to the territorial jurisdiction of another state. Rather, the conflict arises any time a forum state seeks legitimately to exercise its right of jurisdiction under international law over a foreign state defendant, regardless of the physical location of the foreign state's representatives. Thus, the most relevant example for this study arises when a plaintiff sues a foreign state in domestic proceedings for alleged human rights abuses that occurred outside the forum state. Here, too, the authority of the forum state to adjudicate the dispute, hereinafter referred to as "adjudicatory jurisdiction," is at loggerheads with the principle of sovereign equality. This disparity is usefully borne in mind because it means that the original clash of principles, as identified in *The Schooner Exchange*, and, more important, its resolution, as proposed by Justice Marshall and discussed below, provide a workable theoretical framework for resolving a wide range of current problems of state immunity. Competing rationales and their implications for state immunity. The doctrine of foreign state immunity emerged from the theoretical conflict described above. Two leading rationales explain the legal source of the doctrine. One asserts that state immunity is a fundamental state right by virtue of the principle of sovereign equality. The other views state immunity as evolving from an exception to the principle of state jurisdiction, i.e., when the forum state suspends its right of adjudicatory jurisdiction as a practical courtesy to facilitate interstate relations. Not surprisingly, these two rationales-like the principles of international law that they emphasize-find themselves in deep conflict. Moreover, each gives rise to vastly different implications for the nature and operation of the doctrine of foreign state immunity. The traditional starting point for the view that foreign state immunity is a fundamental state right is the maxim *par in parem non habet imperium*, meaning literally "An equal has no power over an equal." Theodore Giuttari aptly explains the maxim's historical origins in the classic period of international law:

In this period, the state was generally conceived of as a juristic entity having a distinctive personality and entitled to specific fundamental rights, such as the rights of absolute sovereignty, complete and exclusive territorial jurisdiction, absolute independence and legal equality within the family of nations. Consequently, it appeared as a logical deduction from such attributes to conclude that as all sovereign states were equal in law, no single state should be subjected to the jurisdiction of another state.

Thus, according to the “fundamental right” rationale, *par in parem non habet imperium* is simply a specific application of the general principle of sovereign equality. Despite the fact that modern international law has largely discarded the classic notion of inherent state rights, the “fundamental right” rationale has exhibited surprising resiliency. The Italian Corte di cassazione has opined, for example, that state immunity is “based on the customary principle *par in parem non habet jurisdictionem*, that has received universal acceptance.” The Polish Supreme Court found that “the basis of the immunity of foreign States is the democratic principle of their equality, whatever their size and power, which results in excluding the jurisdiction of one State over another (*par in parem non habet iudicium*).” Scholars, too, have embraced this rationale. An early edition of Oppenheim’s *International Law*, for example, described the foundations of state immunity as a “consequence of State equality,” with reference to the maxim *par in parem non habet imperium*.

In recent history, Communist publicists have been among the strongest supporters of the “fundamental right” rationale, which they found an attractive response to the emergent theory of restrictive state immunity, a theory that affords no immunity for acts of a commercial or private nature. The restrictive view was antithetical to the prevailing socialist philosophy, which held that politics and trade were inseparable aspects of the socialist state; in essence, a socialist state acted *qua* state in all its dealings. M. M. Boguslavskij, the Russian scholar, thus rejected the notion that a state could surrender its sovereignty, and with it its

right of state immunity, simply by engaging in commercial or private activity. He, like many of the socialist scholars, adhered to the “fundamental right” view.

Of particular interest to this study are the implications of the “fundamental right” view regarding the nature and operation of state immunity. Here, Professor Sucharitkul’s comments are illustrative. In resolving the clash of norms inherent in problems of state immunity, he concludes: “It has become an established rule that between two equals, one cannot exercise sovereign will or power over the other, ‘Par in parem non habet imperium.’ ” While Sucharitkul acknowledges that the principle of territorial jurisdiction is a basic principle of international law, he emphasizes a state’s right to sovereign equality. Thus, according to Sucharitkul, the principle of state jurisdiction must give way to the principle of sovereign equality to effectuate a state’s right of immunity. This view, if correct, presents substantial obstacles to human rights litigation, as plaintiffs must contend with and overcome a state right to immunity, perhaps even of a fundamental nature.

According to another view, state immunity arises not out of a fundamental state right but, rather, as an exception to the principle of state jurisdiction. On this theory, state immunity is ascribed to “practical necessity or convenience and particularly the desire to promote good will and reciprocal courtesies among nations.” Clearly, this aim largely influenced Justice Marshall’s opinion in *The Schooner Exchange*, where he recognized that “intercourse” between nations and “an interchange of those good offices which humanity dictates and its wants require” foster “mutual benefit.” States obtain such benefits, according to Justice Marshall, by means of their exclusive territorial jurisdiction. In particular, he noted that “all sovereigns have consented to a relaxation in practice... of that absolute and complete jurisdiction within their respective territories which sovereignty confers.” Justice Marshall went on to observe that the forum state could advance international affairs by granting a foreign sovereign “license” to conduct its affairs in the forum state. Such license was often conferred as part of a bilateral arrangement by which the foreign sovereign would afford reciprocal

treatment to the representatives of the forum state when present in the foreign sovereign's territory. The effect of this "relaxation" of jurisdictional authority, as Justice Marshall described it, was to permit a foreign sovereign, together with his representatives and property, to enter and operate within the forum state without fear of arrest, detention, or adverse legal proceedings.

Support for Justice Marshall's "practical courtesy" approach is evident in international law scholarship. In his 1980 lectures at the Hague Academy, Ian Sinclair, commenting on *The Schooner Exchange*, described the "true foundation" of foreign state immunity as its "operation by way of exception to the dominating principle of territorial jurisdiction." He continued:

[O]ne does not start from an assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified. One starts from the assumption of nonimmunity, qualified by reference to the functional need (operating by way of express or implied licence) to protect the sovereign rights of foreign States operating or present in the territory.

Sir Robert Jennings echoed this sentiment when positing that in regard to state immunity, "territorial jurisdiction is the dominating principle."

Unlike the "fundamental right" rationale, the "practical courtesy" view resolves the theoretical clash between sovereign equality and state jurisdiction in favor of the latter. As a consequence, the scope of the entitlement to state immunity is defined by the extent to which the forum state chooses to suspend its right of jurisdiction. As Justice Marshall insightfully pronounced: "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." Accordingly, on this theory, no norm of international law, not even the principle of sovereign equality, is capable of derogating a state's

jurisdictional authority as exercised legitimately by its own courts, except in cases where the forum state has agreed to waive this right.

Resolving the conflict of principles: The primacy of adjudicatory jurisdiction. Determining which of the above rationales more persuasively explains the theoretical foundation of state immunity has profound implications for human rights litigation. If state immunity is deemed a fundamental right of statehood, then human rights litigants face nearly insurmountable obstacles. The state defendant is entitled to presumptive immunity and even the normative hierarchy theory cannot be effective because it is by no means clear that *jus cogens* norms trump a fundamental state right to immunity. Such negative consequences, however, need not be explored in detail here, as a critical examination of the two rationales reveals that the “practical courtesy” rationale is more persuasive than the “fundamental right” rationale. From this conclusion one may infer that the regulation of state immunity falls, as a threshold matter, within the authoritative domain not of the foreign state defendant but, rather, of the forum state. As described below, three reasons support this conclusion.

The problem with the “fundamental right” rationale is that it assumes that the principle of sovereign equality is the root of the *maxim par in parem non habet imperium*, and thus that the *maxim* prohibits one state’s exercise of jurisdiction over another. The true meaning of sovereign equality, however, disproves this assumption. Sovereign equality does not mean that all states are equal in any given circumstances but that, as Edwin Dickinson observed, every state enjoys an “equality of capacity for rights.” Dickinson based his views on those of Heffter, who wrote that sovereign equality “means nothing more nor less than that each state may exercise equally with others all rights that are based upon its existence as a state in the international society.” Thus, a state’s “capacity for rights,” according to Dickinson, relates to the freedom and ability of states to engage in official conduct typically associated with statehood, such as the

formulation and promotion of domestic and foreign policies, the execution of treaties, and membership in international organizations.

This meaning of sovereign equality is further defined by the basic strictures of the system of international law. It is axiomatic that international law allocates sovereign authority to govern in accordance with national borders; the United States governs within U.S. territory on behalf of Americans, France governs within French territory on behalf of the French, and so on. Each state exercises territorial jurisdiction within its political unit as a function of its sovereignty. Thus, a state's capacity for rights, like statehood itself, is linked to a defined geographical area, i.e., the territory within the national borders of the state. It follows that this capacity for rights, albeit equal in potential to that of every other state, may have greater or lesser force, in relation to that of other states, in proportion to its connection to national territory. For example, a state's capacity for rights stands at its apogee when applied in relation to its own territory and citizens. Accordingly, "[a] sovereign state is one that is free to independently govern its own population in its own territory and set its own foreign policy"-to the exclusion of all other states.

Conversely, by simple operation of the principle of sovereign equality, a state's capacity for rights will diminish when in direct conflict with another state's sphere of authority, i.e., the jurisdiction of that state over persons, property, and events in its national territory. For example, a foreign sovereign present in an alien forum state quite obviously may not govern on behalf of the local citizenry; again, this is a right that the forum state generally enjoys to the exclusion of all other states. Hence, the same principle of sovereign equality that entitles the foreign sovereign to govern with respect to its own national territory now excludes it from exercising authority in another state's territory. In such cases, the foreign state's capacity for rights with respect to the forum state reaches its lowest ebb.

Seen in this light, the literal meaning of *par in parem non habet imperium*, “an equal has no authority over an equal,” fails to reflect the realities of the international legal order. The principle of sovereign equality means that every state enjoys an “equal capacity for rights” in relation to every other state, but it does not alter the fact that a state may exercise the rights of statehood only with respect to its own territory and population. If, according to international law, a state is the sole master of its domain, persons and property located within the forum state necessarily come within the forum state government’s control and authority—even if endowed with foreign sovereign status. Were international law to dictate otherwise, the present state-centric paradigm would crumble.

This is not to say that foreign states should be refused immunity privileges in all circumstances but that an entitlement to immunity is not intrinsic to statehood. Thus, foreign state immunity is a privilege, not a right, and, accordingly, the maxim *par in parem non habet imperium* is a distortion of the principle of sovereign equality. Neither the maxim nor its purported progenitor, the principle of sovereign equality, persuasively supports the conclusion that one state cannot exercise jurisdiction over another, and the “fundamental right” rationale is fatally flawed for assuming so.

The view that state immunity is a fundamental state right has often been used to support the absolute approach to immunity, which held that states enjoy complete immunity from foreign domestic proceedings. Indeed, absolutists would argue that, as a product of the principle of sovereign equality, immunity extends to the limits of a state’s sovereignty and, moreover, that a state acts *qua* state in all of its affairs regardless of the nature of its conduct. Absolute immunity is a myth, however—a fact that undermines the “fundamental right” approach on which absolute immunity is understood to rest. A brief assessment of the historical growth of the doctrine of state immunity proves this point.

First, it is a myth that states ever enjoyed absolute immunity from foreign jurisdiction. While scholars often refer to an early period of “absolute immunity,” typically citing *The Schooner Exchange* as the leading case of the day, this title has more historical than legal significance and should not be interpreted as meaning that states were exempt at that time from foreign jurisdiction in all circumstances. Indeed, after a rigorous examination of *The Schooner Exchange*, Gamal Badr persuasively argued:

For [Chief Justice] Marshall... the starting point [of the case] was the local state’s exclusive territorial jurisdiction to which immunity was an exception emanating from the will of the local state itself. He did not envisage a blanket immunity for the foreign state as a general rule, to which exceptions would be made to permit the exercise of the local state’s territorial jurisdiction.

Indeed, this crucial observation led Professor Badr to conclude that *The Schooner Exchange* “does not uphold the proposition that there exists a peremptory rule of international law requiring that an absolute immunity from the territorial jurisdiction be recognized in favour of foreign states.”

The more realistic explanation of the absolute approach is that at one time foreign states, as a practical matter, were immune from foreign jurisdiction. In the eighteenth and nineteenth centuries, sovereigns interacted with one another in peacetime in a very limited way, predominantly through diplomatic intercourse or military cooperation. Consequently, interstate disputes almost inevitably touched upon sensitive foreign policy matters. The law of state immunity reflected these sensitivities and the prevailing preference for resolving these disputes by diplomacy, rather than adjudication. Most likely, claims against states in respect of private conduct-though technically not barred from foreign adjudication-were also handled diplomatically in accordance with the prevailing state-centric paradigm. Thus, one cannot equate the fact that courts did not exercise jurisdiction over foreign states in this early period with a general

prohibition against doing so on account of the principle of sovereign equality.

Second, the emergence and increasing acceptance of a restrictive approach to immunity is itself antithetical to the “fundamental right” approach. The classic justification for the distinction between public and private acts in the restrictive immunity theory was that the sovereign, in effect, descends from his throne when operating as a merchant and thereby subjects himself to the local laws of the forum state. Though this distinction in state activity is admittedly somewhat arbitrary, it nevertheless undermines the “fundamental right” position. If state immunity were really based on a fundamental principle of international law, then the movement toward restricting immunity would not have encountered so few legal and political obstacles. In other words, if state immunity were a fundamental state right, it would never be susceptible to theoretical division along public/private lines.

The “practical courtesy” rationale furnishes the more persuasive and realistic explanation for the doctrine of state immunity because it appropriately emphasizes the vital role of the principle of adjudicatory jurisdiction. As a logical matter, a foreign state cannot be entitled to immunity without the prior existence of a jurisdictional anchor to establish the court’s competence. This observation results from the plain fact that a court lacking jurisdictional competence is completely devoid of authority to adjudicate a legal dispute. Thus, as the International Court of Justice explained in the Case Concerning the Arrest Warrant of 11 April 2000, “[I]t is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction.” Addressing the role of jurisdiction is thus crucial to any understanding of the true nature and operation of the doctrine of state immunity. The *Schooner Exchange* highlights this point, because there Justice Marshall realized, quite rightly, that jurisdiction must be established before state immunity could be considered. Jurisdiction was not contested in that case because the presence of the Exchange in U.S. territorial

waters constituted the necessary connection with the forum to establish the district court's in rem jurisdiction. With this matter established—one that the “fundamental right” view neglects—state immunity could only obtain as an exception to the adjudicatory jurisdiction of the forum state.

Nevertheless, the principle of sovereign equality cannot be said to have no function in the state immunity equation. On the contrary, respect for the coequal status of a foreign sovereign state serves typically as the primary motivation for granting immunity privileges. On this theory, however, a state's entitlement to immunity is not compelled by the principle of sovereign equality but, rather, derives from the forum state's waiver of adjudicatory jurisdiction with the aim of promoting mutually beneficial interstate relations.

Finally, the “practical courtesy” rationale promotes a more sensible international policy than the “fundamental right” rationale. States understood to possess a fundamental right to immunity would be permitted to act with impunity. Carried to the logical extreme, this notion would mean that foreign states acting in their foreign capacity could never be held accountable by the forum state. On the other hand, if state immunity is considered a practical courtesy, capable of being modified (or even withdrawn, if need be), then a more balanced relationship is maintained between the foreign state and the forum state. A foreign state will be more cautious about treading on the interests of other states, fearing that unacceptable conduct will result in the withdrawal of immunity and, in turn, the review of such conduct by domestic courts.

Correcting false presumptions. The foregoing discussion has revolved primarily around the broad principles animating the doctrine of foreign state immunity, and has shown, in particular, the theoretical persuasiveness of the “practical courtesy” rationale. Indeed, this persuasiveness is significant because it suggests that a forum state remains unrestricted, at least by a fundamental principle of international law, from exercising jurisdiction over a foreign-state

human rights offender, so long as an appropriate connection exists between the alleged offense and the forum state.

Yet when one surveys the actual law of foreign state immunity, as formulated and applied, an entirely different picture emerges. In practice, the rules that regulate state immunity law assume that a foreign state is immune from suit, unless demonstrated otherwise. Taking an example from national practice, section 1604 of the U.S. Foreign Sovereign Immunities Act of 1976 (FSIA) contains the general rule that “a foreign state shall be immune from the jurisdiction of the courts of the United States,” which may be abrogated only by application of one of the exceptions to immunity enumerated in section 1605. According to the FSIA’s legislative history, the statute “starts from a premise of immunity and then creates exceptions to the general principle.” Similarly, the Swiss Federal Tribunal wrote:

According to a generally recognized rule of public international law, the sovereignty of each State is limited by the immunity of other States, in particular with regard to the jurisdiction of municipal courts and proceedings for enforcement. One State cannot be brought before the courts of another State except in exceptional circumstances.

These approaches, a function of codification in the American case and of constitutional orientation in the Swiss (as described further in the next section), unnecessarily build theoretical hurdles to human rights litigation.

International instruments paint largely the same picture. Article 15 of the European Convention provides: “A Contracting State shall be entitled to immunity from the jurisdiction of courts of another Contracting State if the proceedings do not fall within Articles 1 to 14,” which enumerate various exceptions to immunity. Article 5 of the draft articles on jurisdictional immunities of states and their property of the International Law Commission (ILC) provides that “[a] State

enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles.” Articles 10 through 17 subsequently carve out various exceptions to the general rule. In the case of the draft articles, the Drafting Committee’s rapporteur, Professor Sucharitkul, stated the following about the draft articles’ theoretical approach:

[T]he draft articles should begin to attempt the formulation of a basic rule of State immunity. Based upon a series of the available source materials on State practice..., the draft has to face two interesting sets of options. In the first place, a rule of international law on State immunity could start from the very beginning as a rule of State immunity, or it could go back beyond and before the beginning of State immunity. It could... regard immunity not as a rule, nor less as a general rule of law, but more appropriately.... as an exception to a more basic rule of territorial sovereignty.... [T]he International Law Commission is more inclined towards cutting the Gordian knot at the beginning, and beginning with a general rule of State immunity....

Several practical reasons can help to explain why state immunity is treated as the general rule, but unfortunately they have resulted in a misleading legal framework. Indeed, viewing state immunity as the general rule obfuscates the reality that state immunity derives from a forum state’s concession of jurisdiction and is not presumptively a right under international law, as explained above. Reversing these false presumptions about foreign state immunity is no small task. As Rosalyn Higgins has counseled, “It is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction.” However, by understanding that “[i]t is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity,” the possibilities for meaningful and effective human rights litigation emerge. With jurisdiction as the rule and immunity as the exception, it is

incumbent upon the foreign state defendant, not the individual plaintiff, to point to the rule, domestic or international, that requires immunity.

The Status of State Immunity in Relation to International Law

If, as argued above, the doctrine of foreign state immunity does not derive from a fundamental principle of international law, namely sovereign equality, then what is the status of the doctrine in relation to international law? As previously noted, there is only one comprehensive multilateral agreement that governs state immunity, the European Convention on State Immunity, which has been ratified by only a handful of countries. Thus, for the vast majority of states, state immunity is unregulated by treaty as a general matter. The next question, then, involves determining the extent to which foreign state immunity is binding on states as customary international law. The following discussion demonstrates that, although customary international law compels immunity protections as to a limited core body of state conduct, a broader range of state behavior not included in the core, such as state-sponsored human rights violations, is entitled to immunity solely as a matter of domestic law.

The scope of state immunity under customary international law. What is the scope of immunity protection afforded foreign states under customary international law? From Justice Marshall's perspective in *The Schooner Exchange*, determining the extent of immune conduct under international law was a rather straightforward exercise. Viewing a state's entitlement to immunity as the exception, not the rule, he deduced readily from state practice those "peculiar circumstances" in which states had waived jurisdiction in favor of immunity. The prevailing international custom led Justice Marshall to conclude that states had waived jurisdiction in favor of the following categories of immunity: (1) the freedom of the foreign sovereign from arrest or detention, (2) the diplomatic protection of foreign ministers, (3) the free passage of friendly foreign troops, and (4) the passage of friendly warships present in the host state.

Immunity for conduct falling into one of these categories was warranted because of the “mutual benefit” that such protection provides to the community of nations. Any state conduct that fell outside the core of immune activity did not require immunity protection.

Twentieth-century developments, however, have obscured Justice Marshall's direct observations. As the globalization of trade and commerce increasingly brought states and private merchants into contact, many states sought to expand their entitlement to immunity beyond the strictures of customary international law so as to evade any commercial liability in a transaction gone sour. This self-serving policy laid the foundation for the myth that states were immune from suits of all kinds. In time, principles of fairness in commercial dealing prevailed and compelled the movement to restrict immunity as to a state's commercial or private conduct, *acta jure gestionis*. The primary justification for the restrictive theory of immunity was said to be that judicial review of foreign state conduct of a commercial or private nature did not affront the dignity of the state.

Approaching the question of immunity on the basis of the *imperii* / *gestionis* distinction produced a metaphysical quandary: where should the line between public and private state conduct be drawn? For example, is a contract between a foreign state entity and a private manufacturer for the purchase of army boots a public or private act? To simplify matters, the restrictive approach came to focus more on establishing undisputed categories of nonimmune conduct and neglected to develop firm criteria for determining immune conduct. The codification movement on both the national and international levels proceeded on a similar basis. National state immunity legislation, the European Convention, and the leading codification projects enumerated detailed categories of nonimmune conduct, i.e., the “exceptions” to immunity, while leaving all other state conduct to fall under a catchall rule of immunity. As explained above, this approach inappropriately reversed the presumption of immunity in the doctrine of foreign state immunity.

As a result of its awkward development, the restrictive approach to immunity, as adopted by most states, draws the line between immune and nonimmune conduct at a point beyond that required by customary international law. In fact, most states afford a range of immunity protections to foreign states that exceed the demands of customary international law. Accordingly, the doctrine of foreign state immunity is currently stratified into three types of state conduct: (1) conduct that is immune by virtue of customary international law, (2) conduct that is immune solely by virtue of domestic law, and (3) conduct that is not entitled to immunity under either customary international law or domestic law.

The ICJ's recent decision in *Arrest Warrant* of April 11, 2000 provides strong evidence as to the existence and nature of the rule of state immunity under customary international law. In that case, the Democratic Republic of the Congo protested the issuance by a Belgian investigating magistrate of "an international arrest warrant in absentia" against the incumbent minister for foreign affairs of the Congo, alleging violations of human rights and humanitarian law. The ICJ found that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal." Notably, the ICJ's conclusion squares precisely with Justice Marshall's findings in *The Schooner Exchange* regarding the immunities of foreign ministers and thus reaffirms the status of customary international law in that area.

What is perhaps most interesting about the *Arrest Warrant* case is its rationale for an international rule of state immunity. The ICJ concluded that customary international law compels state immunity regarding foreign ministers "to ensure the effective performance of their functions on behalf of their respective States" and to "protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties." The

Arrest Warrant decision is again entirely consistent with the findings in *The Schooner Exchange*, in which Justice Marshall concluded that states waive their right to adjudicatory jurisdiction over a foreign state as to certain conduct that promotes the “mutual benefit” of the community of nations, such as the exchange of foreign ministers. From these cases, a persuasive rationale for granting immunity with respect to certain state conduct emerges—a rationale that arguably is a prerequisite to establishing the *opinio juris* necessary for a rule of customary international law.

Conversely, when state conduct fails to promote “mutual benefit” among nations, the international law status of a rule that immunizes such conduct is dubious at best. Two examples from U.S. case law underscore this point. In *Letelier v. Republic of Chile* and *Liu v. Republic of China*, U.S. courts found that assassinations by foreign government agents committed in the United States were not “discretionary” state conduct within the meaning of the FSIA and thus fit into the FSIA’s exception to immunity for torts committed in U.S. territory. Under a strict application of the *imperii / gestionis* distinction, such conduct, i.e., state-sanctioned assassination, would be immune by virtue of its official mandate. However, in *Letelier* and *Liu* the courts did not identify a rule of international law that required immunity where the state conduct in question was “clearly contrary to the precepts of humanity as recognized in both national and international law.”

The 1996 amendment to the FSIA further evidences that customary international law does not immunize detrimental state conduct. The 1996 amendment creates an additional category of nonimmune conduct as to a limited range of acts committed by states designated by the U.S. government as “state sponsors of terrorism.” The amendment applies to actions by or on behalf of U.S. citizens that allege “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources” for such acts. The provision flatly rejects the traditional *imperii / gestionis* distinction in its application to conduct that “is engaged in by an

official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.” Notably, although the U.S. government expressed opposition to the 1996 amendment in a previous form, it never asserted that curtailing immunity for state conduct that violates human rights would constitute a breach of international law.

To summarize: It is established that customary international law mandates immunity as to a core body of state conduct. However, because of the awkward development of the theory of restrictive immunity, insufficient attention has been paid to defining the exact content of this core as it has developed since Justice Marshall’s assessment in 1812. In fact, the prevailing approach to state immunity obscures the reach of the international rule of state immunity by establishing a false presumption of immunity and creating a catchall category for immune conduct. As a consequence, the current formulation of the doctrine of foreign state immunity, as adopted by most states, the European Convention, and the leading codification projects, grants foreign states more immunity privileges than customary international law dictates.

Emerging consensus regarding restrictive immunity. For much of the last century, state immunity practice has been starkly divided between two groups of nations: countries that have favored the theory of restrictive immunity, mainly the Western capitalist countries; and countries that have clung to the theory of absolute immunity, mainly the Communist and socialist countries. Recent developments indicate that the gap between absolutist and restrictivist states is narrowing. The collapse of the Soviet empire has brought about great social and political changes in Eastern Europe, which have slowly influenced state immunity practice in the formerly Communist countries. The development of market economies and the participation in global commerce by the former Soviet countries, especially Russia, have strained the utility of the doctrine of absolute immunity and undoubtedly will cause a policy shift toward restrictive immunity. Evidence suggests that even the People’s Republic of China, a staunch supporter of

absolute immunity, may be moderating its position. Such tendencies, while not yet etched in stone, show that the gap between absolutist and restrictivist practice may be as narrow today as it has ever been.

Still, setting aside the narrowing of the absolute/restrictive immunity split, one finds a myriad of substantive variations in national approaches to state immunity law. While each and every variation cannot possibly be addressed here, one significant example is revealing. The FSIA, for instance, instructs U.S. courts to look at the “nature” and not the “purpose” of a foreign state defendant’s conduct in order to determine whether such conduct is commercial or public in nature and, thus, whether it is immune or nonimmune from suit. French courts, by contrast, appear to place more emphasis on the purpose of the operative state act, instead of its nature. The Cour de cassation, France’s highest court, held that foreign states may be entitled to immunity not only for *acta jure imperii*, but also for acts performed in the interest of public service. Thus, the real possibility exists that U.S. and French courts may draw the line between immune and nonimmune foreign state conduct in very different places.

Accordingly, James Crawford’s earlier observation that the distinction between immune and nonimmune state conduct is drawn less by international law and more by national laws is equally relevant today. Hazel Fox similarly posits that while there is a clear trend “away from an absolute doctrine to a restrictive doctrine... the absence of a universal convention and the diversity of State practice... produce[] extraordinary complexity and variety in the emerging rules.” Such significant variations in national practice have led another state immunity scholar, Joseph Dellapenna, to conclude his comparative study of immunity practice in the United Kingdom, France, and Germany with the following words:

All these countries, in grappling with the need to constrain the actions of sovereigns by the rule of law, have developed roughly similar responses that are collectively described by the rubric of the “restrictive theory of foreign state

immunity.” A closer examination of the details of the several approaches to foreign state immunity... demonstrates, however, that consensus exists only at a rather high level of abstraction.

Because the doctrine of foreign state immunity is a mix of international law and domestic law, the reach of restrictive immunity, i.e., the extent to which states are not immune, may or may not be an international law question. Indeed, the nature of the inquiry depends on whether the core of immune conduct is implicated. In the *Arrest Warrant* case, for example, the ICJ addressed the scope of a sitting foreign minister’s immunities, a category of state conduct that clearly touches upon established customary international law matters. In contrast, in the *Letelier and Liu* cases, U.S. courts examined state conduct, namely assassination, that clearly falls outside the core body of immune conduct. Thus, the issue of immunity was decided solely as a matter of domestic law, and customary international law played no role in the analysis.

The conceptual divide between the civil law and common law countries. The mixed character of the doctrine of foreign state immunity has produced varying emphasis on its component parts in the civil law and common law systems, respectively. A review of the literature from the civil law and common law countries reveals starkly divergent views on the roles that international law and domestic law play in formulating state immunity policy. On the one side, the civil law countries deem state immunity generally to be a principle of customary international law that must be applied domestically by national courts. On the other side, the common law countries place more emphasis on regulating state immunity through domestic legislation, not customary international law.

Even a brief look at the civil law literature shows that these countries are firmly committed to the notion that state immunity originates in customary international law. Regarding state immunity, Antonio Cassese writes that “limitations are imposed upon State sovereignty by customary rules.” Jurgen Bröhmer also

writes: “The law of state immunity as it now stands as a customary rule of international law is commonly based and justified on various general principles of international law.” Professors Cassese and Brohmer, like other civil law scholars, appear to accept state immunity’s status as international custom as a given.

The rationale for the civil law position largely derives from two factors: (1) the civil law constitutional design; and (2) the lack of national immunity legislation in many civil law countries. The Italian experience is illustrative. The Italian Constitution, like many civil law constitutions, includes a broad and binding mandate regarding national compliance with international law. Article 10 of the Italian Constitution states: “The Italian legal system shall conform with the generally recognized rules of international law.” This provision not only endows Italian judges with the power to ensure national compliance with international law, but also imposes a constitutional obligation to do so. Thus, Italian courts, like most civil law courts, are generally inclined to view themselves as the chief interpreters and enforcers of international law.

Combined with the lack of immunity legislation in many civil law countries, this constitutional obligation has given rise to the belief that state immunity law derives from customary international law. According to one civil law scholar, there can be no other possible origin. Indeed, the Italian Corte di cassazione in the *Pieciukiewicz* case declared that the doctrine of state immunity is rooted in a “customary principle” that “comes under the purview of Article 10(1)” of the Italian Constitution.

In contrast, the common law countries tend to perceive state immunity as more a product of domestic law, although originally this was not the case. In *The Schooner Exchange*, as seen, Justice Marshall looked to international custom to determine the scope of entitlement to foreign state immunity. However, since that early time, the common law approach has changed dramatically owing in

large part to an influential article published in 1951 by Hersch Lauterpacht entitled *The Problem of Jurisdictional Immunities of Foreign States*. In that publication, the English scholar made the then-provocative declaration that there was “no rule of international law which obliges states to grant jurisdictional immunity to other states.” In support, Professor Lauterpacht relied on two points of evidence. First, he noted that during the twentieth century when the prevailing rule of absolute immunity began to lose its force, “international practice show[ed] no frequent instances of protests against assumption of jurisdiction, including execution, over foreign states.” Second, Lauterpacht cited the fact that many states granted immunity privileges on the basis of reciprocity and added that “[s]tates do not make the observance of established rules of international law dependent upon reciprocity.” Free from the constraints of international law, Lauterpacht went on to establish the “assimilative approach” to state immunity, according to which a state is immune from suit only to the extent that the host state enjoys immunity before its own courts.

Upon assessing the development of state immunity law more than twenty-five years later, Professor Brownlie, in the third edition of his treatise, observed: “it is difficult as yet to see a new principle which would satisfy the criteria of uniformity and consistency required for the formation of a rule of customary international law.” Brownlie suggested a “fresh approach” to state immunity:

The concepts of sovereign immunity..., the exclusive jurisdiction of the state within its own territory, and the need for an express licence for a foreign state to operate within that national jurisdiction..., can be taken as starting points. Each state has an existing power, subject to treaty obligations, to exclude foreign public agencies, including even diplomatic representation. If a state chooses, it would enact a law governing immunities of foreign states which would enumerate those acts which would involve acceptance of the local jurisdiction.

After citing as examples of such acts the conclusion of contracts subject to private law and consent to arbitration, Brownlie proposed that foreign trade partners of the host state be notified about the new legislation, which would take effect after sufficient time to allow them to withdraw, and that rights under such agreements could be reserved. He continued:

States would thus be given a licence to operate within the jurisdiction with express conditions and the basis of sovereign immunity, as explained in the *Schooner Exchange*, would be observed. Such a legal regime would be subject to the inevitable immunity *ratione materiae*..., and the principles of international law as to jurisdiction. The approach suggested would avoid the difficulties of the distinction between acts *jure gestionis* and acts *jure imperii*.

Thus, Brownlie, like Lauterpacht, suggested that the doctrine of immunity was not a rule of customary international law.

Lauterpacht and other commentators who agreed with him influenced the contemporary common law view of state immunity. Indeed, Monroe Leigh, the FSIA's chief architect, stated that in the years leading up to the U.S. change in policy from the absolute to the restrictive approach to immunity, "there was no agreement among the students of international law as to whether Sovereign Immunity was a principle of customary international law or merely a matter of comity between nations." Consequently, when reforming U.S. state immunity policy in the 1970s, the drafters of the FSIA undoubtedly felt free to operate on the basis that, save for a limited area of immunity law governed primarily by treaty, "the entire field is open to definition by domestic law." That several common law countries followed the U.S. lead and enacted their own domestic immunity legislation reflects broad consensus on this matter.

The distinct perspectives of the civil law and common law countries regarding the source of state immunity law have yielded divergent approaches to solving the

human rights litigation problem. The civil law countries, with their emphasis on international law, are arguably more inclined to address human rights issues on the international law level and thus more receptive to approaches like the normative hierarchy theory. The common law countries, with their skepticism about state immunity's broad reach under international law, generally prefer to regulate state immunities through the application of domestic legislation. While the merits of each approach are debatable, the civil law perspective has created, as explained below, a propensity for adopting the normative hierarchy theory and thus unnecessarily complicates resolution of the human rights litigation problem.

11.4 THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND STATE IMMUNITY

In light of the discussion in part I, one must measure the normative hierarchy theory against two fundamental legal realities: (1) state immunity arises not out of a fundamental right of statehood but, rather, out of the concession of a forum state's right of adjudicatory jurisdiction; and (2) foreign states are not entitled to immunity under customary international law as to most, if not all, activity that constitutes human rights offenses. The common thread running through both observations (and the crucial point that the normative hierarchy theory overlooks) is that the forum state, not the foreign state defendant, holds the authority to regulate the scope and content of the state immunity privilege. Part II presents a summary of the normative hierarchy theory, as developed in the American and European contexts, and then turns to a substantive critique of the theory.

The Anatomy of the Normative Hierarchy Theory

The American approach. The normative hierarchy argument had its genesis in the United States. The notion that foreign sovereign immunity might be trumped by superior international law norms first emerged as a reaction to the U.S. Supreme Court's decision in *Argentine Republic v. Amerasia Shipping Corp.* In that case, the plaintiffs sued in tort to reclaim losses arising out of the

unprovoked bombing of an oil tanker on the high seas by the government of Argentina, allegedly a violation of international law. The Court ruled that the FSIA was “the sole basis for obtaining jurisdiction over a foreign state” in U.S. courts. Moreover, the Court held that American courts may hear suits against foreign states only where Congress has explicitly provided a statutory exception to the FSIA’s general rule of immunity. A suit involving an armed attack against a ship on the high seas was not one over which Congress had intended the courts to exercise jurisdiction, the Court found, and thus it rejected the plaintiffs’ claim.

The Court’s restrictive interpretation of the FSIA’s exceptions to immunity prompted a group of three law students to publish an inventive Comment in 1991 entitled *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*. The authors propose that states lose all entitlement to state immunity under international law when they injure individuals in violation of jus cogens norms. Their theory starts from the premise that, following the Nuremberg trials, the structure of international law changed; in particular, the “rise of jus cogens” placed substantial limitations on state conduct in the name of peaceful international relations. Indeed, “[b]ecause jus cogens norms are hierarchically superior to the positivist or voluntary laws of consent, they absolutely restrict the freedom of the state in the exercise of its sovereign powers.”

This conclusion has ramifications for the doctrine of state immunity, the authors argue. Their theory turns on the assumption that state immunity is a product of state sovereignty, resting “on the foundation that sovereign states are equal and independent and thus cannot be bound by foreign law without their consent.” Since state immunity is not a peremptory norm, when invoked in defense of a violation of jus cogens, it must yield to “the ‘general will’ of the international community of states.” Accordingly, [b]ecause jus cogens, by definition, is a set of rules from which states may not derogate, a state act in violation of such a rule will not be recognized as a sovereign act by the community of states, and the

violating state therefore may not claim the right of sovereign immunity for its actions.

In causing harm to an individual in violation of jus cogens, a state may no longer raise an immunity defense because the state may be regarded as having implicitly waived any entitlement to immunity. To give domestic effect to this waiver in U.S. courts, the authors point to section 1605(a)(1) of the FSIA, which empowers the exercise of district court jurisdiction in cases in which a state “has waived its immunity either explicitly or by implication.”

While the implied waiver argument has never formed the basis of a legal decision in U.S. courts, it has not lacked influence on U.S. judges. In *Siderman de Blake v. Republic of Argentina*, the U.S. Court of Appeals for the Ninth Circuit accepted the argument’s basic premise. The case involved the alleged torture of an Argentine citizen and expropriation of property by Argentine military officials. Following the logic of the implied waiver theory, the plaintiffs argued that jus cogens trumps foreign state immunity, resulting in the defendant’s loss of immunity for torturing the victim, José Siderman. The court determined that Argentina was not immune from suit because Argentina had waived its entitlement to immunity under section 1605(a)(1) of the FSIA by involving itself in U.S. legal proceedings, but in dicta it echoed the plaintiff’s arguments, stating that “[a] state’s violation of the jus cogens norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law.”

The normative hierarchy argument again received substantial consideration in *Princz v. Federal Republic of Germany*, a case involving claims of personal injury and forced labor arising from the plaintiff’s imprisonment in Nazi concentration camps. In *Princz*, the U.S. Court of Appeals for the District of Columbia denied the plaintiff’s claims, specifically rejecting the normative hierarchy argument. Judge Patricia Wald, however, advocated its application in an impassioned dissent. “Germany waived its sovereign immunity by violating the

jus cogens norms of international law condemning enslavement and genocide,” she wrote. To support this conclusion, Judge Wald contended: “Jus cogens norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity.” Judge Wald considered the waiver of immunity to be a fact of international law and thus urged that the FSIA’s waiver provision be construed consistently, so as to allow plaintiffs to sue states for violations of jus cogens.

Though never formally accepted as the basis for judicial decision in U.S. courts, the normative hierarchy theory continues to spark interest among jurists and scholars alike. Plaintiffs suing under the FSIA for alleged human rights violations continually press for its application. Numerous scholars and international law commentators have also become engaged in the debate over the validity of the normative hierarchy theory. However, the current position of U.S. courts to interpret the FSIA’s implied waiver provision strictly is likely to incapacitate the normative hierarchy theory from amending U.S. state immunity policy.

The contribution of continental Europe. Though it originated in the United States, the normative hierarchy theory has had a substantial impact in the countries of continental Europe. For instance, in his treatise on public international law, Professor Cassese writes that “peremptory norms [or jus cogens] may impact on State immunity from the jurisdiction of foreign States, in that they may remove such immunity.” In support, he cites, among other sources, Judge Wald’s dissent in *Princz v. Federal Republic of Germany*. Professor Bianchi states that “[r]eliance on the hierarchy of norms in the international legal system is a viable argument to assert non-immunity for major violations of international human rights.” The European brand of the theory is nearly identical in concept to its American predecessor: because jus cogens, a primary norm, is hierarchically superior to state immunity, a secondary norm, a foreign state is not immune for violations of human rights norms of a peremptory nature.

Where the European approach distinguishes itself is in its potential to affect national state immunity policy. Since the civil law countries of continental Europe have not enacted national immunity legislation and many of their constitutional systems oblige national courts to look to international law for guidance on foreign state immunity, it comes as no surprise that the civil law Europeans approach the normative hierarchy theory from the perspective of progressive jurisprudential development. Professor Bianchi, for example, calls for “a coherent interpretation” of the norms of the international legal order to resolve “the inconsistency between the rule of state immunity and the principle of protection of fundamental human rights.” According to Bianchi, ensuring that the application of international law produces just results requires judges to undertake a “value-oriented” interpretation of international law norms, giving preference to peremptory norms, such as the protection of human rights, over norms of lesser importance, such as state immunity.

Largely free from the constraints of national immunity legislation and treaty obligations, a civil law court not surprisingly would feel inclined to make the type of “value-oriented” decision that Bianchi encourages. The adjudication of *Prefecture of Voiotia v. Federal Republic of Germany* in the Greek courts provides an apt example. The facts of the case arose out of the Nazi occupation of southern Greece during World War II. During that period Nazi military troops committed war atrocities against the local inhabitants of the Prefecture of Voiotia in 1944, particularly in the village of Distomo, including willful murder and destruction of personal property. Over fifty years later, the plaintiffs, mostly descendants of the victims, sued the Federal Republic of Germany in the Greek Court of First Instance of Leivadia for compensation for the material damage and mental suffering endured at the hands of the Nazis.

On the preliminary matter of jurisdiction, the court of first instance invoked the normative hierarchy theory to rule that Germany was not immune from suit. The

court found that, “according to the prevailing contemporary theory and practice of international law opinion,... the state cannot invoke immunity when the act attributed to it has been perpetrated in breach of a jus cogens rule.” The rule of jus cogens that the court identified was contained in Articles 43 and 46 of the regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague Regulations). Article 43 obligates an occupying power to respect the laws in force in the occupied territory and to ensure public order and safety, while Article 46 obliges occupying powers to protect certain rights of the occupied, especially the rights to family honor, life, private property, and religious convictions. The court concluded that the demonstrated breach of this rule deprives a state of an immunity defense in domestic proceedings.

The reasons that the court provided in support of its decision are revealing and worth reiterating in their entirety:

- a) When a state is in breach of peremptory rules of international law, it cannot lawfully expect to be granted the right of immunity. Consequently, it is deemed to have tacitly waived such right (constructive waiver through the operation of international law); b) Acts of the state in breach of peremptory international law cannot qualify as sovereign acts of state. In such cases the defendant state is not considered as acting within its capacity as sovereign; c) Acts contrary to peremptory international law are null and void and cannot give rise to lawful rights, such as immunity (in application of the general principle of law *ex iniuria jus non oritur*); d) the recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order; e) The invocation of immunity for acts committed in breach of a peremptory norm of international law would constitute abuse of right; and finally f) Given that the principle of territorial sovereignty, as a fundamental rule of the international legal order, supersedes the principle of immunity, a state in breach of the former when in illegal occupation of foreign territory, cannot possibl[y] invoke

the principle of immunity for acts committed during such illegal military occupation.

The reasoning in subsections a) through e) bears the traditional marks of the normative hierarchy theory. The court's pronouncement in subsection d) would appear to take the theory one step further, indicating that its nonapplication would implicate the forum state in the foreign state defendant's alleged breach of international law. Subsection f) is somewhat incongruous, seemingly advocating an entirely separate ground for denying immunity based on the forum state's authority to define its own state immunity law. Relying on this reasoning, the court awarded the plaintiffs 9.5 billion drachmas (approximately \$30 million) in the form of a default judgment.

The Hellenic Supreme Court, Areios Pagos, affirmed the holding of the lower court and arguably supported its reasoning relating to the normative hierarchy theory. The Court began its analysis with the so-called torts exception to immunity. After reviewing the international law landscape, the Court concluded that an exception to immunity for torts committed by a foreign state in the forum state's territory was established in customary international law, "even if the acts were *acta jure imperii*." Second, the Court identified what it perceived as an obstacle to application of the torts exception in this case: the atrocities at issue were probably committed in the course of armed conflict, a situation in which the foreign state, even as occupier, would generally retain immunity. However, the Court found that this rule of immunity was inapplicable, because in the case of military occupation that is directly derived from an armed conflict and that, according to the now customary rule of Article 43 of the [Hague Regulations], does not bring about a change in sovereignty or preclude the application of the laws of the occupied State, crimes carried out by organs of the occupying power in abuse of their sovereign power do not attract immunity.

Accordingly, the Court determined that the Nazi atrocities were an “abuse of sovereign power,” on which Germany could not base an immunity defense. The Court’s decision to apply the torts exception to deny immunity for acts ostensibly of a public nature itself represents an interesting departure from the traditional public/private distinction in state immunity law. What is more attention grabbing about the decision, though, is that the Court, in reaching it, drew upon the normative hierarchy theory. Specifically, the Court found that the Nazi acts in question were “in breach of rules of peremptory international law (Article 46 of the [Hague Regulations]),” and thus that “they were not acts *jure imperii*.” Consequently, the Court concluded that Germany had impliedly waived its immunity. As a result, one may view the Court’s decision as the first endorsement of the normative hierarchy theory by a significant national tribunal. The Greek Supreme Court’s decision is a substantial contribution to state immunity practice in itself. Yet it is perhaps more significant as a potential harbinger of developments in state immunity policy in other similarly oriented countries, which neither have enacted national immunity legislation nor are parties to the European Convention on State Immunity. For this group of states, the national courts possess the primary authority to define foreign state immunity law and many, like Greece, may be bound to look to international law for applicable guidance.

A Critique of the Normative Hierarchy Theory

The misalignment of norms. Supporters of the normative hierarchy theory perceive the human rights litigation problem as a conflict between two international law norms, state immunity and *jus cogens*. In short, the superior norm of *jus cogens* is capable of striking down the inferior norm of state immunity, allowing the human rights victim to advance his or her claim. However, this approach is flawed conceptually because the norms that are purportedly at odds with one another under the normative hierarchy theory in reality never clash.

As part I demonstrated, state immunity is not a norm that arises from a fundamental principle of international law, such as state equality, or from the latter's purported theoretical derivative, the maxim *par in parem non habet imperium*. To reiterate briefly: The principle of state equality guarantees that states will enjoy equal capacity for rights. This capacity diminishes when a state intrudes on another state's sphere of authority, and becomes virtually dormant within another state's territorial borders. There is thus no inherent right of state immunity, as, ironically, is often suggested in the writings in support of the normative hierarchy approach.

Moreover, the practice by states of waiving adjudicatory jurisdiction to create immunity privileges has created binding norms through the development of international custom as to only a core body of state conduct. Such norms do not apply to state conduct, e.g., the violation of the human rights of another state's citizens, that undermines the aim and purpose of the international legal order. If a foreign state receives immunity protection for such conduct, it is because that protection is afforded by the domestic policies of the forum state or, in the case of a few select states, pursuant to the European Convention. Accordingly, the norms of state immunity and *jus cogens* do not clash at all insofar as human rights violations are concerned. To accept otherwise, as the normative hierarchy theory does, endows foreign states with more of a claim to state immunity than reality dictates.

If there is any clash of international law norms that underpins the human rights litigation problem, it is between human rights protections and the right of the forum state to regulate the authority of its judicial organs, otherwise known as the right of adjudicatory jurisdiction. As demonstrated in part I, as a threshold matter state immunity operates as an exception to the overriding principle of adjudicatory jurisdiction and as customary international law does not cover human rights offenses. Any protections for human rights abuses on the domestic

level thus result purely from the exercise of the forum state's right of adjudicatory jurisdiction. That is, the forum state with ultimate authority to establish the entitlement of state immunity has chosen to close its courts to meaningful human rights litigation. Therefore, rather than being between *jus cogens* and state immunity, the real conflict is between *jus cogens* and the principle of adjudicatory jurisdiction.

Finally, even if state immunity were an international law norm that shields states from liability for human rights claims, the normative hierarchy theory would fail to explain persuasively how a clash of norms would arise. Lady Fox criticizes the theory, asserting that, as "a procedural rule going to the jurisdiction of a national court," state immunity "does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement." Essentially, the norms of human rights and state immunity, while mutually reinforcing, govern distinct and exclusive aspects of the international legal order. On the one hand, human rights norms protect the individual's "inalienable and legally enforceable rights.... against state interference and the abuse of power by governments." On the other hand, state immunity norms enable state officials "to carry out their public functions effectively and... to secure the orderly conduct of international relations." To demonstrate a clash of international law norms, the normative hierarchy theory must prove the existence of a *jus cogens* norm that prohibits the granting of immunity for violations of human rights by foreign states. However, the normative hierarchy theory provides no evidence of such a peremptory norm.

Questions surrounding the application of *jus cogens*. Unresolved issues surrounding the application of *jus cogens* further undermine the appeal of the normative hierarchy theory. While the existence of *jus cogens* in international law is an increasingly accepted proposition, its exact scope and content remains an open question. Proponents of the normative hierarchy theory, in particular, have failed to generate a precise list of human rights norms with a peremptory

character. To be sure, consensus is emerging as to the status of certain norms, such as the prohibitions against piracy, genocide, slavery, aggression, and torture. Yet these norms, despite their importance to the community of nations, represent only a small fraction of the norms that potentially may belong to the body of peremptory norms. In Prefecture of Voiotia, for example, the Greek courts identified the rights of family honor, life, private property, and religious convictions, enshrined in Article 46 of the Hague Regulations, as the operative *jus cogens*. Further, the concept of *jus cogens* is not confined solely to the realm of human rights. Commentators have suggested that crucial fundamental international law norms, such as *pacta sunt servanda*, may also constitute *jus cogens*.

The undefined character of *jus cogens*, coupled with the general applicability of the normative hierarchy theory, which invests all peremptory norms with immunity-stripping potential, may present problems for the courts. Requiring application of the theory beyond cases of genocide, slavery, and torture would place national courts in an awkward position. The theory not only would deprive the forum state of its right to regulate access to its own courts, but also would force them to determine whether a particular norm of international law had attained the status of *jus cogens*, a task that international legal scholars have grappled with for decades with only limited success. Further, the normative hierarchy theory logically requires courts to treat all violations of peremptory norms uniformly, even violations of norms that do not implicate human rights but are arguably *jus cogens*, such as *pacta sunt servanda*. In addition, allowing the courts to determine the parameters of *jus cogens* through application of the normative hierarchy theory may undermine the principle of separation of powers, in some cases inappropriately transferring foreign-policymaking power from the political branches of government to the judiciary. Finally, as Judges Pellonpaa and Bratza warned in the *Al-Adsani* case, adoption of the normative hierarchy theory could be the first step on a slippery slope that begins with state immunity from jurisdiction but could quickly extend to state immunity from execution

against sovereign property and ultimately threaten the “orderly international co-operation” between states.

Second, if, as mentioned above, the true clash of norms underpinning the human rights litigation problem is between the protection of human rights and the principle of adjudicatory jurisdiction, what, then, is the relationship between these two norms? A thorough answer to this question cannot be offered in an article of this length, but a brief exploration of the issue may be enlightening.

If *jus cogens* is defined as a body of norms representing the core, nonderogable values of the community of states, then included in this body, arguably, is the principle of state jurisdiction, i.e., a state’s freedom to exercise jurisdiction, especially on the basis of territoriality, through its own governmental institutions, including its national courts. Support for this proposition is reflected in the core principles of international law, which consider the state the basic building block of the international legal order. In fact, most of the foundational rules of international law hold as the highest value the protection of the territorial integrity, independence, and equality of states. Even taking account of recent developments in international law that limit state sovereignty, such as in the areas of human rights and environmental law, it cannot be said at this point in time that any rule has emerged that would limit a state’s authority to determine its own jurisdiction over foreign states.

If the principle of state jurisdiction is so paramount to the community of states as to place it within the body of *jus cogens*, the human rights litigation problem may involve a clash of two peremptory norms, the protection of human rights and the principle of exclusive state jurisdiction. This scenario raises perplexing questions of international law. Can there be a hierarchy of norms within the body of peremptory norms and, if so, which ranks higher, human rights or territorial jurisdiction? The answers to these questions, if any, lie deep in uncharted territory of international legal scholarship and cannot be ascertained here. The

very fact that the normative hierarchy theory would appear to lead courts into such a theoretical abyss casts doubt on its practical viability and utility.

Denying immunity through fictions. Explaining how a state loses its immunity is a critical element of the normative hierarchy theory. Two different, but interrelated, explanations are offered in the literature. On one rationale, a state is said to waive or forfeit its entitlement to immunity by implication when it commits a jus cogens violation. On the other rationale, state conduct that violates a jus cogens norm is said to fall outside the category of protected state conduct known as *acta jure imperii*, for which immunity is traditionally granted, such conduct being devoid of legitimacy because it contravenes the will of the community of nations.

Neither of these explanations is persuasive because both are based on fictions resulting from a misunderstanding of the true nature and operation of the doctrine of foreign state immunity.

The notion that a foreign state implicitly waives or forfeits any entitlement to immunity by acting against jus cogens is untenable for the reasons developed in part I: a foreign state's entitlement to immunity for human rights violations is not derived from international law, so a foreign state cannot lose its right to immunity by violating international law. Indeed, the entitlement in this respect-and therefore also the waiver or forfeiture of immunity-is strictly a matter of domestic regulation. This plain reality is illustrated in *Smith v. Socialist People's Libyan Arab Jamahiriya*, in which Libya conceded, for the limited purpose of its appeal, that its alleged participation in the bombing of Pan Am Flight 103 would consist of a jus cogens violation, but disputed that "such a violation demonstrates an implied waiver of sovereign immunity within the meaning of the FSIA." The court ultimately held that Libya had not waived its immunity because the FSIA anticipated implied waiver only under a few select circumstances. *Smith*, while adjudicated under national immunity legislation, is of general appeal, if only to raise the paradoxical question of how a foreign state can be said to have

implicitly waived its entitlement to immunity when it would be likely, if asked, expressly to state the contrary.

The purported exclusion of state-sponsored human rights violations from the category of *acta jure imperii* is equally unpersuasive. Indeed, the distinction between *acta jure imperii* and *acta jure gestionis* is “superficially attractive as a means of keeping state immunity within reasonable limits” but “does not rest on any sound logical basis.” As Judge Gerald Fitzmaurice wrote, “[A] sovereign state does not cease to be a sovereign state because it performs acts which a private citizen might perform.” Along similar lines of logic, a foreign state does not cease to be a sovereign state simply because it commits acts of a criminal nature, including violations of human rights norms. Moreover, if state conduct that violates *jus cogens* is assertedly not *jure imperii* and obviously not *jure gestionis* (private or commercial), then what is it? This question is not addressed by supporters of the normative hierarchy theory. The real answer lies in the fact that foreign states are entitled to immunity for human rights violations only to the extent that a forum state grants them that privilege. Hence, the exclusion of *jus cogens*-violating state conduct from the category of *acta jure imperii* can be effectuated only through the expression of the forum state’s immunity policies to that effect, not by international law.

Misplaced concerns regarding forum state complicity. Supporters of the normative hierarchy theory sometimes argue that the failure to deny state immunity for human rights violations amounts to complicity of the forum state with the *jus cogens* transgression. A brief review of the ILC’s draft articles on state responsibility reveals the shortcomings of this claim. Of the provisions in the draft articles, only chapter IV on the responsibility of a state in connection with the act of another state is even remotely relevant. Articles 16, 17, and 18 of chapter IV address, respectively, situations in which one state aids or assists, directs and controls, or coerces another state in the commission of an internationally wrongful act. In all these provisions, the ILC included a knowledge requirement

for complicity of the third-party state, thus limiting the draft articles' contemplated application to cases of deliberate involvement in the internationally wrongful act before or during its commission. Hence, a forum state cannot be considered complicit for granting jurisdictional immunity to other states long before any lawsuit has been filed.

This does not mean, however, that the forum state cannot hold the foreign-state offender accountable under principles of state responsibility, only that it cannot be penalized for failing to do so. Moreover, immunity in the forum state does not amount to global impunity for state conduct that violates human rights. Indeed, the forum state may pursue a human rights claim in numerous alternative political and judicial arenas. Nevertheless, repealing immunity protections that exist solely by virtue of the forum state's domestic policies and are not compelled by international law ranks high among all options.

11.5 NEW PROSPECTS FOR THE PROGRESSIVE DEVELOPMENT OF FOREIGN STATE IMMUNITY LAW

As demonstrated above, the normative hierarchy theory offers an unpersuasive solution to the human rights litigation problem. Foreign states are not immune from human rights litigation by virtue of a fundamental sovereign right or a rule of customary international law. With ultimate authority both to grant and to rescind the entitlement to immunity in these circumstances, the forum state may establish a state immunity policy in this area unrestricted by international law. This reality places the burden of providing meaningful human rights litigation not on the foreign state defendant, as the normative hierarchy theory contends, but on the government entities in each forum state with responsibility for establishing the state immunity laws.

While the forum state has authority to repeal many state immunity privileges, especially in the area of human rights protections, by exercising its right of

adjudicatory jurisdiction, a more comprehensive justification for curtailing immunity is in order. Although an international rule of immunity exists, the modern doctrine of foreign state immunity fails to delineate the scope of its coverage. Accordingly, the line between international law and domestic law protections is not always readily apparent. Neither the traditional *gestionis/imperii* distinction of the theory of restrictive immunity nor the piecemeal approach of national and international codification efforts of national state immunity legislation accurately distinguishes between immune and nonimmune state conduct. These approaches, as explained, focus primarily on establishing categories of nonimmune conduct and in so doing promote excessive state immunity protections.

Part III proposes an alternative approach to allocating state immunity entitlements. The approach justifies granting immunity only in circumstances in which such protection promotes orderly relations in the community of states, not least between the forum state and the foreign state. As explained in more detail below, state conduct that does not enhance interstate relations, such as the abuse of citizens of the forum state, should not be entitled to immunity protection.

Developing a Theory of Collective Benefit

One way to identify the scope of the international rule of state immunity is to conceptualize state immunity as arising out of an agreement forged between the forum state and any foreign state with which it seeks to develop transnational intercourse. This approach is consistent with the more persuasive rationale for state immunity, i.e., that immunity protections result from the forum state's waiver of its right of adjudicatory jurisdiction. As Justice Marshall observed in *The Schooner Exchange*, state immunity protections were originally created when the forum state granted a foreign sovereign a "license" to operate within the forum state's jurisdiction free from arrest, seizure, or adverse legal proceedings. To the extent that this practice has crystallized into international custom, the forum state has consented to concede a right of adjudicatory jurisdiction on an enduring

basis. Thus, defining the scope of the international rule of state immunity depends upon determining the circumstances in which forum states have conceded their important right of adjudicatory jurisdiction permanently in favor of immunity protections.

A look at the “agreement” that states have struck with one another regarding state immunity protections is revealing. Traditionally, a forum state’s promise of foreign state immunity has provided foreign states with guarantees against arrest, seizure, and adverse legal proceedings sufficient to entice foreign sovereigns and their representatives into entering and operating within the forum state’s jurisdiction. This promise of immunity, however, is not limitless in scope. As Justice Marshall observed, state immunity exists only for the “mutual benefit” of “intercourse” between states and for “an interchange of those good offices which humanity dictates and its wants require.” Recently, the decision in the Arrest Warrant case confirmed this justification for state immunity in the context of immunities of foreign ministers. The ICJ found that such immunities are designed to enable the ministers to fulfill their functions effectively and to protect them from acts of authority of another state that would thwart them in fulfilling those functions. Accordingly, the sole *raison d’être* for state immunity under customary international law is so that states can perform their public functions effectively and ensure that international relations are conducted in an orderly fashion.

If one accepts this basic premise, then conduct of a foreign state that does not conform with the development of beneficial interstate relations falls outside the state immunity “agreement” and thus is not immune by virtue of international custom. The most obvious example excludes foreign state conduct that does significant harm to the vital interests of the forum state, such as the commission of human rights abuses against the forum state’s nationals. Accordingly, the basic test for distinguishing between immune and nonimmune transactions should not be whether the state conduct is public or private, as the theory of

restrictive immunity requires, but whether such conduct would substantially harm the vital interests of the forum state. Within these parameters, the forum state can more accurately define its domestic state immunity laws in accordance with customary international law requirements.

Although the forum state has wide discretion to modify its state immunity laws so as to provide better judicial access to human rights victims, certain important limitations still condition the forum state's approach. First, any changes in domestic state immunity policy must be consistent with the international rules of adjudicatory jurisdiction. Since state immunity, as a threshold matter, is an exception to adjudicatory jurisdiction, the absence of jurisdiction over state conduct would eliminate the state immunity question altogether. Thus, when opening up domestic courts to human rights litigation, it is necessary to ensure maintenance of an appropriate connection between the dispute and the forum state under international law.

Second, the forum state, like the foreign state, belongs to a community of states and must abide by community rules, the rules of international law. For example, several principles restraining state behavior are enshrined in the United Nations Charter; they include, among others, the obligation to uphold the principles of sovereign independence, the peaceful settlement of disputes, and the protection of human rights. Thus, any alteration in state immunity law that unjustifiably endangers peaceful relations may be unlawful. This consideration would preclude, for example, collusion between the forum state and the defendant state to commit a crime that is mutually beneficial to them but outlawed by international law. Additional obligations will likely arise out of international agreements to which the forum state is a party or out of customary international law.

Applying the Theory of Collective State Benefit

Two recent developments in state immunity law, in the United States and Greece, exemplify the legitimate restrictions on immunity that states seeking to

advance human rights litigation may impose in accordance with the theory of collective state benefit. As mentioned above, in 1996 the U.S. Congress amended the FSIA by creating an additional exception to the immunity of certain foreign states for a limited range of human rights violations. Notably, the newest FSIA exception requires no territorial connection to the United States. Instead, jurisdiction is predicated on the American nationality of the victim or the claimant. The new exception is consistent with the theory of collective state benefit in that it stands to protect one of the most vital interests of the democratic state, the well-being of its citizenry. Indeed, the scope of the exception could arguably be broader, consistent with the theory, and could extend to a broader class of potential foreign state defendants, not only those designated as sponsors of terrorism.

The second development is the Greek Supreme Court's decision in *Prefecture of Voiotia*, discussed earlier, which held the Federal Republic of Germany liable for Nazi acts of aggression against the civilian population of southern Greece. In addition to its misguided acceptance of the normative hierarchy theory, the case is notable for its advancement of the so-called torts exception to immunity. As indicated above, the Court ruled that "national courts have jurisdiction to adjudicate damages, including compensation for offenses against people or property that took place in the territory of the forum by organs of a foreign country that was present in the territory when the offense took place, even if it was *acta jure imperii*." In this regard, *Prefecture of Voiotia* not only adds to the corpus of law defining the torts exception to immunity, but also contributes to the growing consensus that such an exception has application even in cases of abuse of sovereign power.

The second contribution of *Prefecture of Voiotia*, really an extension of the first, is its recognition that even in the field of armed conflict a state is not immune when it abuses its official power to the detriment of citizens of the forum state. The Court noted that the commentary to Article 12 of the ILC draft articles, Article 31

of the European Convention, and section 16(2) of the UK State Immunity Act all indicate a rule of customary international law that entitles states to immunity in regard to military activity. The Court determined, however, that this rule contained a significant exception “for damages arising from crimes, such as crimes against humanity, that affect, not necessarily as a consequence of war, particular civilians, not civilians at large and which civilians have no connection with that armed conflict during military occupation.” In the context of that case, the Court concluded: “[T]here is no state immunity from criminal acts of the organs of the occupying power that take place by abusing their sovereign power as reprisals for acts of resistance movements against innocent and nonparticipant persons.” The Court continued:

[T]he torts in question (murders that also constitute crimes against humanity) were directed against specific persons limited in number who resided in a specific place, who had nothing to do with the resistance activity resulting in the death of German soldiers taking part in a terror operation against the local population.... [They were] hideous murders that objectively were not necessary in order to maintain the military occupation of the area or subdue the underground action, carried out in the territory of the forum by organs of the German Third Reich in an abuse of sovereign power.

Prefecture of Voiotia conforms with the theory of collective state benefit for many of the same reasons as the 1996 FSIA amendment. The infliction of wanton terror on Greek civilians by the Nazis during World War II was a direct affront to the vital interest of Greece, the forum state. Regardless of the label it bears, sovereign, military, *jure imperii*, or otherwise, a foreign state’s unlawful killing of the forum state’s civilians destroys bilateral relations between forum and foreign state and may even jeopardize the security and stability of the community of states. Thus, putting aside its endorsement of the normative hierarchy theory, Prefecture of Voiotia represents a legitimate solution to the human rights litigation problem.

Taken together, the 1996 FSIA amendment and Prefecture of Voiotia demonstrate that progress can be made in resolving the human rights litigation problem in a manner consistent with the true nature of the doctrine of foreign state immunity. That is to say that the forum state, through the agent it designates to create and interpret foreign state immunity law (the U.S. Congress in the case of the 1996 amendment and the Hellenic Supreme Court in the case of Prefecture of Voiotia), is empowered to modify foreign state immunity law to an extent consistent with the theory of collective state benefit. These developments further show that such modifications are possible in two very different legal settings: the 1996 amendment arose in a common law country with national immunity legislation, while Prefecture of Voiotia resulted from the jurisprudential application of international law in a civil law country without national immunity legislation.

11.6 CONCLUSION

State immunity is the product of a conflict between two international law principles, sovereign equality and adjudicatory jurisdiction, which conflict is resolved more persuasively in favor of adjudicatory jurisdiction. Thus, state immunity exists as an exception to the overriding principle of adjudicatory jurisdiction.

The awkward development of the doctrine of foreign state immunity in the twentieth century, which derived from the myth that states once enjoyed absolute immunity from suit, has, however, distorted the perception of how state immunity operates. Today, the prevailing formulation of state immunity laws improperly reverses the presumption of adjudicatory jurisdiction by establishing a catchall rule of immunity. Consequently, in many national jurisdictions state immunity laws grant foreign state defendants more protection than customary international law requires.

With respect to certain core state conduct, the practice of waiving adjudicatory jurisdiction has crystallized into a rule of customary international law binding on states. While the existence of a rule of customary international law concerning state immunity is firmly established, the exact scope of this rule is difficult to discern. Nevertheless, despite uncertainty at the edges, sufficient evidence testifies that customary international law does not compel immunity protections for state conduct that violates human rights. Any immunity that a foreign state receives for such conduct is solely conferred by domestic laws.

The normative hierarchy theory offers an unpersuasive solution to the human rights litigation problem. The theory assumes a clash of international law norms of human rights and state immunity that, in fact, does not occur. There is no international norm of state immunity that shields foreign states from human rights litigation and, even if there were, the normative hierarchy theory fails to explain persuasively how human rights norms can trump state immunity norms when the two types of norms govern mutually exclusive types of state conduct. The real source of the human rights litigation problem is the forum state's failure to exercise its right of adjudicatory jurisdiction with respect to human rights cases. However, this problem is rather difficult to resolve on a theory of normative hierarchy, as the real conflict may involve a clash of two peremptory norms of international law, human rights and adjudicatory jurisdiction.

Finally, because state immunity is at its root an exception to the overriding principle of adjudicatory jurisdiction, the forum state may exercise its right of adjudicatory jurisdiction to curtail any excess state immunity privileges that do not emanate from international law, including protections for human rights violations. A theory of collective state benefit guides the process of repealing extraneous immunity protections and draws the line between immune and nonimmune conduct more appropriately than the normative hierarchy theory. On the collective state benefit theory, state conduct that fails to enhance interstate

relations, particularly between the forum state and the foreign state, does not warrant immunity protection. The clearest example of this kind of conduct is activity by the foreign state defendant that harms the vital interests of the forum state, such as abuse of the citizens of the forum state.

CHAPTER 12

GENERAL AUGUSTO PINOCHET CASE: JURISPRUDENTIAL MILESTONE

Individual accountability for crimes of international law is a topic which recently has gained considerable momentum. It should thus be of little surprise that the legal proceedings, currently under way in the United Kingdom, for the extradition to Spain of the former head of state of Chile, General Augusto Pinochet Duarte, have spurred a wave of interest which goes well beyond academic circles and reaches out to the world public opinion at large. Inevitably, the numerous legal facets of the case have been largely overshadowed by the highly sensitive political aspects of the matter. In fact, the Pinochet case should be a cause for international lawyers to inquire afresh whether former heads of state and other state officials may be held responsible before the municipal courts of a foreign state for acts, qualified as criminal under international law, which have allegedly been committed when they were in post. In essence, this is the query around which the recent decision of the House of Lords in the Pinochet case revolves.

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Although the Law Lords were bound to apply the relevant provisions of the State Immunity Act, which regulates the jurisdictional immunities of foreign states and their organs in the United Kingdom, international law played a crucial role in the interpretation of the municipal statute. The interplay of municipal law and international law has long secured the adjustment of the doctrine of jurisdictional immunities to the changing demands of the international community. Recent attempts to resort to municipal courts for the adjudication of cases involving issues of state or individual responsibility for serious violations of international law call for a reassessment of this interaction. In particular, due heed should be paid to the issue of whether municipal courts may aptly complement international

¹³²⁰ House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent)* (On Appeal from a Divisional Court of the Queen's Bench Division); *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent)* (On Appeal from a Divisional Court of the Queen's Bench Division) (No. 3), Judgment of 24 March 1999, reported as *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No. 3) in [1999] 2 All E.R. 97 [hereinafter *Ex Parte Pinochet* (HL 2)].

law enforcement mechanisms whenever this is necessary to foster those common interests and values which are perceived as fundamental by the international community as a whole.

Little, if any, doubt exists that the charges originally brought by Spain against General Pinochet are of the utmost gravity. Genocide, torture, hostage-taking and murder on a massive and systematic scale attain the status of crimes of international law either via customary or treaty law.¹³²¹ Nor is the principle of individual criminal responsibility under international law any longer disputed.¹³²² What remains controversial is whether the domestic courts of a foreign state are a proper forum for prosecuting individuals for crimes of international law and, if so, what immunity, if any, should be granted to former heads of state. While there is a concordance of views among scholars and many provisions can be traced in the statutes and recent practice of international tribunals to the effect that no plea of immunity is available in case of crimes of international law, the case law of domestic courts is scant and hardly conclusive on the point. Most cases concern civil suits brought against individuals whose states have either waived their immunity or even acted as plaintiffs in the relevant legal proceedings. Also the cognate doctrine of act of state or non-justiciability, alternatively referred to by some Law Lords as a possible bar to criminal proceedings against General Pinochet in the United Kingdom, is worth addressing. In particular, the availability of a plea of non-justiciability in cases concerning the responsibility of individuals for crimes of international law must be the object of careful scrutiny as it may considerably restrain the role of municipal jurisdictions in enforcing applicable rules of international law.

¹³²¹ See, *inter alia*, S. R. Ratner and J. S. Abrams, *Accountability for Human Rights Atrocities in International Law* (1997); L. S. Sunga, *The Emerging System of International Criminal Law* (1997); J. J. Paust et al., *International Criminal Law* (1996); M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (1992); L. S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (1991).

¹³²² See by this author, 'Individual Accountability for Crimes Against Humanity. Reckoning with the Past, Thinking of the Future', 19 *SAIS Review* (1999), at 223 *et seq.*

The remarkable impact which the decision will most likely have on the future development of a fair and comprehensive system of international criminal law enforcement is a cause for testing its correctness against the background of contemporary standards of international law. The aim of this paper is to address the legal issues, sketchily outlined above, with a view to ascertaining whether the House of Lords was right in interpreting international law to the effect of denying immunity to the former head of a foreign state indicted of acts of torture and crimes against humanity, thus allowing extradition proceedings to continue. Before turning to the relevant issues, however, a cursory account of the legal proceedings in the United Kingdom may be apt.

12.1 Legal Proceedings in the UK: the Interaction of Municipal and International Law

A The High Court Decision

As is well known, General Pinochet entered the United Kingdom in September 1997. Just before his return to Chile, after undertaking surgery in London, he was arrested on the basis of two provisional arrest warrants issued by UK magistrates, at the request of Spanish courts,¹³²³ pursuant to the European Convention on Extradition.¹³²⁴ General Pinochet's counsel immediately moved to have the two arrest warrants quashed by the High Court. On 28 October the Divisional Court of the Queen's Bench Division ruled¹³²⁵ that the first arrest warrant was bad as the crimes for which extradition had been requested by Spain were not extradition crimes under the UK Extradition Act.¹³²⁶ As regards

¹³²³ The first provisional warrant had been issued, on the basis of the 1989 Extradition Act, by Mr Nicholas Evans, a Metropolitan Stipendiary Magistrate on 16 October 1998. The allegations concerned the murder of Spanish citizens in Chile, which offences were within the jurisdiction of Spain. The second provisional arrest warrant was issued by another Stipendiary Magistrate, Mr Ronald Bartle. This time more offences were alleged, including conspiracy to commit acts of torture, hostage-taking and conspiracy to murder.

¹³²⁴ European Convention on Extradition, 1957, incorporated in the UK by the European Convention on Extradition Order 1990 (SI 1507 of 1990) as amended.

¹³²⁵ The High Court of Justice, Queen's Bench Division, Divisional Court, In the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum. Re: Augusto Pinochet Duarte, 28 October, 1998, reproduced in 38 ILM (1999) 68.

the second arrest warrant, the Lord Chief Justice held that General Pinochet was immune from jurisdiction as the acts that he had allegedly committed were official acts performed in the exercise of his functions of head of state. The legal basis of the decision was Section 20 of the UK State Immunity Act, which grants to heads of states the same privileges and immunities as those conferred on the heads of diplomatic missions under the 1961 Vienna Convention on Diplomatic Relations, incorporated by reference into the Act and applicable 'with necessary modifications' to heads of states.¹³²⁷ Particularly relevant to the instant case was Article 39(2) of the Vienna Convention which, with the necessary adjustments to the position of heads of states, provides that heads of states shall continue to be immune from the criminal jurisdiction of foreign states, once they are no longer in post, for acts performed in the exercise of their functions as heads of state. Lord Bingham rejected the argument that a distinction could be made, within the category of the official acts of a head of state, between crimes of a different gravity and, consequently, upheld the claim of immunity. In his opinion the Lord Chief Justice indirectly relied on the decision of the English Court of Appeal (Civil Division) in *Al Adsani v. Government of Kuwait*¹³²⁸ to state that if a state is entitled to immunity for acts of torture, it should not be surprising that the same immunity is enjoyed by a head of state. Justice Collins, concurring in the Lord Chief Justice's opinion, added that 'history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups' and that he could see 'no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists'.¹³²⁹ The quashing of the second warrant, however, was stayed, as the Court granted leave to appeal to the House of Lords, certifying as a point of law of general

¹³²⁶ According to the principle of double criminality, an extradition crime is an act which is criminal in both the requesting and the requested state. Since the murder of a British citizen by a non-British citizen outside the United Kingdom would not constitute an offence in respect of which the UK could claim extraterritorial jurisdiction, the murder of Spanish citizens by non-Spanish citizens in Chile cannot be qualified as an extradition crime.

¹³²⁷ Part I of the SIA was deemed inapplicable to criminal proceedings under Art. 16(4), which expressly excludes criminal proceedings from the scope of application of Part I. Also the House of Lords agreed on this construction.

¹³²⁸ Decision of 12 March 1996, reported in 107 ILR 536.

¹³²⁹ See para. 80 of the High Court's judgment.

public importance 'the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state'.¹³³⁰

B The First Ruling by the House of Lords

The House of Lords on 25 November 1998 reversed the lower court's ruling and held, by a three to two decision, that a former head of state is not entitled to immunity for such acts as torture, hostage-taking and crimes against humanity, committed while he was in his post.¹³³¹ Lord Nicholls, in whose opinion Lord Hoffman concurred, held that international law, in the light of which domestic law has to be interpreted,¹³³² 'has made it plain that certain types of conduct . . . are not acceptable on the part of anyone' and that 'the contrary conclusion would make a mockery of international law'.¹³³³ In the view of Lord Nicholls, General

¹³³⁰ *Ibid*, at para. 88.

¹³³¹ House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent)(On Appeal from a Divisional Court of the Queen's Bench Division)*; *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent)(On Appeal from a Divisional Court of the Queen's Bench Division)*, Judgment of 25 November 1998, 37 ILM (1998) 1302 [hereinafter *Ex Parte Pinochet (HL 1)*]. For a comment see Fox, 'The First Pinochet Case: Immunity of a Former Head of State', 48 *ICLQ* (1999) 207. The House of Lords took into account also the formal request of extradition transmitted by the Spanish Government on 6 November to the UK Government. In the official request further charges were added, including genocide, mass murders, enforced disappearances, acts of torture and terrorism. The Spanish *Audiencia Nacional* had upheld Spanish jurisdiction over the above offences on the basis of the *Ley Organica del Poder Judicial* of 1985, Art. 23 of which allows Spanish courts to exercise jurisdiction over crimes committed by Spanish or foreign citizens outside Spain when such crimes can qualify, under Spanish law, as genocide, terrorism or any other crime which, according to international treaties or conventions, must be prosecuted in Spain. The ruling of the *Audiencia Nacional* sitting in plenary was rendered on 30 October 1998 and the reasoning of the court was released on November 5 (the judgment can be retrieved from the Internet at the following site: <http://www.elpais.es/p/d/especial/auto/chile.htm>. (10 Nov. 1998)). The same conclusion was reached by the *Audiencia Nacional* as regards prosecution in Spain of crimes committed in Argentina at the time of the military *junta* (the judgment can be retrieved from the Internet at the following site: <http://www.elpais.es/p/d/especial/auto/argenti.htm>. (10 Nov. 1998). The two decisions as well as Judge Garzon's extradition order were promptly published in Spain: *El caso de España contra las dictaduras Chilena y Argentina* (1998).

¹³³² See *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] QB 529. It is of note that also Lord Slynn of Hadley referred to *Trendtex* to state that the principle of immunity should be evaluated in the light of the developments of international law relating to international crimes (*Ex Parte Pinochet (HL 1)*, *supra* note 12, at 1311).

¹³³³ *Ibid*, at 1333. Lord Nicholls limited his analysis to torture and hostage-taking. The relevant international conventions have been incorporated into the UK legal system respectively by the Criminal Justice Act 1988 and the Taking of Hostages Act 1982.

Pinochet was not immune under Section 20 of the SIA, as the Act confers immunity only in respect of acts performed in the exercise of functions 'which international law recognises as functions of a head of state, irrespective of the terms of his domestic constitution'. Nor was he entitled to any customary international law doctrine of residual immunity, potentially covering all state officials, for acts of torture and hostage-taking, 'outlawed as they are by international law, cannot be attributed to the state to the exclusion of personal liability'. Finally, both the Torture and Hostage-Taking Conventions permit the extraterritorial exercise of criminal jurisdiction by municipal courts. On a similar line of reasoning Lord Steyn maintained that genocide, torture, hostage-taking and crimes against humanity, condemned by international law, clearly amount to conduct falling beyond the functions of a head of state.¹³³⁴ By contrast, the two dissenting Law Lords held that it is not right to distinguish 'between acts whose criminality and moral obliquity is more or less great' and that the test is 'whether the conduct in question was engaged under colour of or in ostensible exercise of the Head of State's public authority'.¹³³⁵ Consequently, 'where a person is accused of organizing the commission of crimes as the head of the government, in cooperation with other governments, and carrying out those crimes through the agency of the police and the secret service, the inevitable conclusion is that he was acting in a sovereign capacity'.¹³³⁶ Lord Lloyd basically agreed with the construction offered by Lord Bingham that the only meaningful distinction for the purpose of head of state immunity is that between private acts and official acts performed in the execution or under colour of sovereign authority. A former head of state would be entitled to immunity for the latter acts under both common law and statutory law, as the acts in question were clearly of a governmental character. Lord Slynn of Hadley admitted the possibility that the immunity *ratione materiae* retained by a former head of state after ceasing service could be

¹³³⁴ *Ibid*, at 1338.

¹³³⁵ *Ibid*, at 1309 (Lord Slynn). The latter quote is from Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *RdC* (1994), at 56.

¹³³⁶ *Ibid*, at 1323 (Lord Lloyd). Part of the allegations against General Pinochet concerned his coordinating, in cooperation with other governments, the so-called 'Operation Condor', aimed at the systematic repression of political opponents.

affected by the emerging notion of individual crimes of international law. He added, however, that this could be so only to the extent that an international convention clearly defines the crime and gives national courts jurisdiction over it, and that the convention, which must, expressly or impliedly, exclude the immunity of the head of state, is incorporated by legislation in the UK.¹³³⁷

On 10 December, the Home Secretary issued an authority to proceed in order to allow the continuation of extradition proceedings. In doing so he said to have had regard to such relevant considerations as the health of General Pinochet, the passage of time since the commission of the alleged acts and the political stability of Chile. While denying authority to proceed on the charge of genocide,¹³³⁸ the Home Secretary stated that all the other charges alleged in the Spanish request of extradition amounted to extradition crimes and were not of a political character.¹³³⁹

C The Rehearing of the Case and the New Judgment of the House of Lords

On 17 December 1998 the House of Lords decided to set aside its prior judgment, on the grounds that Lord Hoffman, who cast the deciding vote, by failing to disclose his ties to Amnesty International, which, incidentally, had been admitted as an intervener in the proceedings,¹³⁴⁰ was disqualified from

¹³³⁷ *Ibid*, at 1313–1314 (Lord Slynn). Lord Slynn found nothing in international conventions and UK implementing legislation which could take away immunity. Art. 4 of the Genocide Convention which clearly does so as regards ‘constitutionally responsible leaders’ was not incorporated into UK law, whereas neither the Torture Convention nor the Hostage-Taking Convention contain any express exclusion of immunity for heads of states.

¹³³⁸ Interestingly enough, the Spanish National Audience in upholding the jurisdiction of Spanish courts over the alleged acts of genocide had interpreted broadly the definition of the expression ‘genocide’ in the Genocide Convention. After stating, generally, that ‘[s]in distingos, es un crimen contra la humanidad la ejecución de acciones destinadas a exterminar a un grupo humano, sean cuales sean las características diferenciadoras del grupo’, the Court interpreted the Convention systematically within the broader context of the logic of the international legal system and held that the genocide ‘no puede excluir, sin razón en la lógica del sistema, a determinados grupos diferenciados nacionales, discriminándoles respecto de otros’. Therefore, also acts committed against ‘aquellos ciudadanos que no respondían al tipo prefijado por los promotores de la represión como propio del orden nuevo a instaurar en el pays’ could be qualified as genocide (see *El caso de España*, *supra* note 12, at 313–316).

¹³³⁹ The Home Secretary acted pursuant to section 7(4) of the Extradition Act 1989.

sitting.¹³⁴¹ A new hearing before a panel of seven Law Lords was scheduled and, eventually, on 24 March 1999, the House of Lords rendered its decision on the case.¹³⁴² By a majority of six to one, the House of Lords in a lengthy and rather convoluted judgment held that General Pinochet was not immune for torture and conspiracy to commit torture as regards acts committed after 8 December 1988, when the UK ratification of the Torture Convention, following the coming into force of section 134 of the Criminal Justice Act 1988 implementing the Convention, took effect. The second judgment of the House of Lords profoundly differs from the previous one for the treatment given to two issues: the qualification of extradition crimes and the role that some of the Law Lords attributed to the Torture Convention for the purpose of denying immunity to General Pinochet.¹³⁴³ On the one hand, the international law question of which critical date is relevant for the double criminality principle was solved by interpreting the applicable provisions of the Extradition Act to the effect of requiring that the alleged conduct constituted an offence in both the requesting and the requested state at the date of the actual conduct. While Lord Bingham for the Divisional Court and Lord Lloyd in the first ruling of the House of Lords,¹³⁴⁴ had held that the critical date was the date of the request of extradition, the large majority of the Law Lords sitting in the second Appellate Committee agreed that the critical date was the date of the actual conduct.¹³⁴⁵ Besides being contrary to the wording of the Extradition Act and to settled practice,¹³⁴⁶ this interpretation had the effect of remarkably narrowing down the

¹³⁴⁰ Lord Hoffman chaired the charitable arm of Amnesty International in the UK (Amnesty (Charity) International Ltd.): see *The Times*, 8 December 1998.

¹³⁴¹ *The Times*, 18 December 1998. The opinions of the Lords of Appeal are reproduced in 38 ILM (1999) 430.

¹³⁴² *Ex Parte Pinochet (HL 2)*, *supra* note 1.

¹³⁴³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 10 December 1984, 23 ILM (1984) 1027, as modified 24 ILM (1985) 535.

¹³⁴⁴ *Ex Parte Pinochet (High Court)*, Lord Bingham, at para. 44; *Ex Parte Pinochet (HL 1)*, Lord Lloyd, at 1318. As Lord Browne-Wilkinson stated, probably at the first hearing it was conceded that all the charges against General Pinochet were extradition crimes.

¹³⁴⁵ Lord Browne-Wilkinson reached this conclusion via a systematic interpretation of the Extradition Act 1989, also in the light of its predecessor, the Extradition Act 1870. No other Law Lords objected to this construction.

number of offences for which General Pinochet can be extradited.¹³⁴⁷ Since torture only became an extraterritorial offence after the entry into force of section 134 of the Criminal Justice Act 1988, alleged acts of torture and conspiracies to commit torture outside the UK before that time did not constitute an offence under UK law.¹³⁴⁸ Therefore, they could not be qualified as extradition crimes under the principles of double criminality. Only Lord Millett maintained that UK courts would have jurisdiction at common law over acts of torture from a much earlier date, when international law recognized that such acts could be prosecuted by any state on the basis of universal jurisdiction.¹³⁴⁹

On the issue of immunity, only Lord Goff of Chieveley, entirely endorsing Lord Slynn's opinion in the first ruling, held that General Pinochet enjoyed immunity. In particular, Lord Goff maintained that nothing in the Torture Convention could be construed as an express waiver of state immunity. Nor could such a waiver be

¹³⁴⁶ On the double criminality principle see G. Gilbert, *Aspects of Extradition Law* (1991) at 47 *et seq.* See also M. C. Bassiouni, *International Extradition. United States Law and Practice* (1996), stating that for the purpose of double criminality US and Swiss law do not require that the relevant conduct be criminal in both the requesting and the requested state at the time the alleged crime was committed (at 391–392). On UK extradition law see A. Jones, *Jones on Extradition* (1995).

¹³⁴⁷ A schedule of the charges against General Pinochet had been prepared by Alun Jones of the Crown Prosecution Service. The charges are analysed and discussed in detail in Lord Hope's opinion (*Ex Parte Pinochet* (HL 2) at 132b *et seq.*). Only charges of torture and conspiracy to commit torture after 29 September 1988 (the date in which Section 134 of the Criminal Justice Act came into force) were thought to be extradition crimes (charges 2 and 4 of the above schedule) as well as a single act of torture alleged in charge 30. Also the charge of conspiracy in Spain to murder in Spain (charge 9) and such conspiracies in Spain to commit murder in Spain, and such conspiracies in Spain prior to 29 September 1988 to commit acts of torture in Spain, as can be shown to form part of the allegations in charge 4, were deemed to be extradition crimes. The majority, however, held Pinochet immune for such acts. As to the charges related to hostage-taking (charge 3), Lord Hope found them not to be within the scope of the Taking of Hostages Act 1982, as the relevant statutory offence consists of taking and detaining a person to compel somebody else to do or to abstain from doing something, whereas the charges alleged that the person detained was to be forced to do something under threat to injure other parties (which is exactly the opposite of the statutory offence). It might be worth remembering that the charges of genocide were not the object of discussion as the Home Secretary had refused to issue an authority to proceed as regards those charges.

¹³⁴⁸ No one argued that section 134 could operate retrospectively so as to make torture committed outside the UK before the coming into force of the Criminal Justice Act 1988 a crime under UK law.

¹³⁴⁹ Lord Millett held that the jurisdiction of English courts, although mainly statutory, is supplemented by the common law. Therefore, 'English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law', including 'the systematic use of torture on a large scale and as an instrument of state policy' which had already attained the status of an international crime of universal jurisdiction. Eventually, Lord Millett yielded to the view of the majority and proceeded on the basis that Pinochet could not be extradited for acts of torture committed prior to the coming into force of section 134 of the Criminal Justice Act. (*Ex Parte Pinochet* (HL 2) at LI 78b–d).

reasonably implied.¹³⁵⁰ The other Law Lords, albeit on different grounds, found non-immunity in the circumstances of the case. In particular, Lord Browne Wilkinson, the presiding Law Lord, after stating that the prohibition of torture became ‘a fully constituted international crime’ only by the adoption of the Torture Convention, which set up a ‘worldwide universal jurisdiction’,¹³⁵¹ held that the ‘notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention’ and that torture, as defined in the Convention, ‘cannot be a state function’.¹³⁵² Therefore, starting from the

¹³⁵⁰ Besides finding no trace in the travaux préparatoires of discussions concerning the waiver of state immunity, Lord Goff’s stance against immunity heavily relied on policy considerations. The fear of malicious allegations against heads of state, particularly of powerful countries in which they often perform an executive role, should cause one to be cautious in ruling out immunity. By way of example, Lord Goff cites the possibility that a Minister of the Crown or other lower public official may be sued on allegations of acts of torture in Northern Ireland in countries supportive of the IRA. Furthermore, the scope of the rule of state immunity would be limited to what he considers exceptional cases, such as when the offender is found in a third state or in a state where one of its nationals was a victim, the more frequent occurrence being that the offence is committed in the national state of the offender, in which case the latter would have no immunity (*Ex Parte Pinochet (HL 2)* at 128–129a).

¹³⁵¹ Lord Browne-Wilkinson’s reasoning is not deprived of ambiguities. After recognizing that torture on a large scale is a crime against humanity which has attained the status of *jus cogens* (relying on *Prosecutor v. Anto Furundzija*, Case No. IT-95–17/1-T, Trial Chamber of the ICTY, Judgment of 10 December 1998, reproduced in 38 ILM (1999) 317 para. 153) and which justifies states in taking jurisdiction on the basis of the universality principle, he said that he doubted that before the entry into force of the Torture Convention ‘the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organization of state torture could not rank for immunity purposes as performance of an official function’ (*Ex Parte Pinochet (HL 2)* at 14 *et seq.*). This reasoning is inherently flawed. If one characterizes — as Lord Browne-Wilkinson does — the prohibition of torture on a large scale as a *jus cogens* norm, the inevitable conclusion is that no other treaty or customary law rule, including the rules on jurisdictional immunities, can derogate from it. Another aspect in Lord Browne-Wilkinson’s opinion which remains rather unclear is what he means by saying that the crime of torture did not become ‘a fully constituted international crime’ until the Torture Convention set up a system of ‘worldwide universal jurisdiction’ (via the joint operation of Articles 5, 6 and 7). The tautology inherent in the argument is apparent: on the one hand a crime against humanity would entail universal jurisdiction, on the other only when universal jurisdiction can be established over it would an offence become an international crime. A much more coherent argument would have been that torture on a large scale as a crime against humanity entails universal jurisdiction, whereas single acts of torture have become a crime and are subject to universal jurisdiction only via the Torture Convention (see the reasoning of Lord Millett). No such distinction, however, appears in Lord Browne-Wilkinson’s opinion.

¹³⁵² Among the reasons for holding that acts of torture cannot be qualified as a function of a head of state, Lord Browne-Wilkinson mentioned the following: i) international law cannot regard as official conduct something which international law itself prohibits and criminalizes; ii) a constituent element of the international crime of torture is that it must be committed ‘by or with the acquiescence of a public official or other person acting in an official capacity’. It would be unacceptable if the head of state escaped liability on grounds of immunity while his inferiors who carried out his orders were to be held liable; iii) immunity *ratione materiae* applies to all state officials who have been involved in carrying out the functions of the state; to hold the head of state immune from suit would also make other state officials immune, so that under the Torture Convention torture could only be punished by the national state of the official (*Ex Parte Pinochet (HL 2)* at 114J–115a–e).

moment in which the UK became party to the Convention, Spain and Chile having already ratified it, all the parties involved had agreed to exercise extraterritorial jurisdiction over acts of torture committed by or with the acquiescence of state officials.¹³⁵³ On a similar line of reasoning, Lord Hope of Craighead held that Chile had lost its right to object to the extraterritorial jurisdiction of the UK upon its ratification of the Convention, which would prevent the parties from invoking immunity *ratione materiae* 'in the event of allegations of systematic or widespread torture'.¹³⁵⁴ Both Lord Browne-Wilkinson and Lord Hope followed Lord Slynn's analysis,¹³⁵⁵ their views departing from his only as regards the impact of the Torture Convention on the rule of immunity *ratione materiae*. Lord Saville concurred in holding that the provisions of the Torture Convention are inconsistent with immunity, which, consequently, is inapplicable to the conduct in question, at least in the reciprocal relations among the parties.¹³⁵⁶ Lord Hutton found that acts of torture, already outlawed by international law at the time of adoption of the Torture Convention, are not amenable within the functions of a head of state and that 'there is no waiver

¹³⁵³ See Art. 1 of the Torture Convention. The Convention entered into force on 26 June 1987. Spain ratified on 21 October 1987, Chile on 30 September 1988 and the UK on 8 December 1988.

¹³⁵⁴ Immunity *ratione materiae* would shield General Pinochet as regards the other charges. Lord Hope qualifies as an international crime divesting a former head of state of his immunity only systematic or widespread torture. Only such an offence would attain the status of *jus cogens*, compelling states to refrain from such conduct under any circumstances and imposing an obligation *erga omnes* to punish this conduct. Although state torture was already at the time of the early allegations against General Pinochet an international crime under customary international law it was not until the Torture Convention, which enabled states to assume jurisdiction over such offences, that 'it was no longer open to any state which was a signatory to the convention to invoke the immunity *ratione materiae* in the event of allegations of systematic or widespread torture committed after that date being made in the courts of that state against its officials or any other person acting in an official capacity' (*Ex Parte Pinochet (HL 2)* at 152c). Lord Goff's analysis is not entirely convincing. If one assumes, as he does, that the prohibition of systematic torture, which most of the time requires state action, is a *jus cogens* rule, violations of which every state is under an obligation to punish, it is difficult to see how such an obligation could be discharged unless domestic courts are given the possibility of investigating, prosecuting and punishing the individuals who have committed such heinous acts. Furthermore, it is hard to see how the distinction between systematic torture and single instances of torture for the purpose of state immunity can be drawn on the basis of the Torture Convention.

¹³⁵⁵ See *supra* note 18 and accompanying text.

¹³⁵⁶ Since the Convention prohibits so-called 'official torture', to Lord Saville, 'a former head of state who it is alleged resorted to torture for state purposes fallsfairly and squarely within those terms' (*Ex Parte Pinochet (HL 2)* at 169J). States parties to the Convention have clearly and unambiguously accepted, in the view of Lord Saville, that official torture can be punished 'in a way which would otherwise amount to an interference in their sovereignty' (*ibid.*, at 170c). For the same reason, Lord Saville held that also a plea based on act of state would fail in the circumstances of the case (*ibid.*, at 170e).

issue as the immunity to which Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to acts of torture'.¹³⁵⁷ Lord Millett's opinion is at variance with that of his colleagues. According to Lord Millett, universal jurisdiction existed well before the Torture Convention over crimes committed in violation of jus cogens and which gravity and scale could be regarded 'as an attack on the international legal order'.¹³⁵⁸ Relying on Eichmann and Demjanjuk,¹³⁵⁹ he said that any state is permitted under international law to assert its jurisdiction over such crimes and that the commission of such crimes in the course of one's official duties as a responsible officer of the state and in the exercise of his authority as an organ of that state is no bar to the exercise of jurisdiction by a national court. The Torture Convention simply expanded the cover of international crimes to single instances of torture, imposing on states the obligation to exercise their jurisdiction over the crime. According to Lord Millett, recognition of immunity would be 'entirely inconsistent with the aims and object of the Convention'.¹³⁶⁰ Finally, Lord Phillips of Worth Matravers held that crimes of such gravity as to shock the consciousness of mankind cannot be tolerated by the international community and that state immunity *ratione materiae* cannot coexist with international crimes and the right of states to exercise extraterritorial

¹³⁵⁷ (*Ex Parte Pinochet (HL 2)* at 166e. According to Lord Hutton, although the alleged acts were carried out by General Pinochet 'under colour of his position as head of state... they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime.' (*ibid.* at 165d) Lord Hutton, while accepting the limitation inherent in the qualification of extradition crimes under UK law, which prevents consideration of allegations of torture prior to the coming into force of section 134 of the Criminal Justice Act, said *in dictum* that 'acts of torture were clearly crimes against international law and that the prohibition of torture had acquired the status of *jus cogens* by that date' (*ibid.* at 164c). He later added that not only torture committed or instigated on a large scale but also a single act of torture qualifies as a crime of international law.

¹³⁵⁸ *Ex Parte Pinochet (HL 2)* at 177d. Lord Millett correctly notes that the very official or governmental character of the offences characterizes crimes against humanity and that 'large scale and systematic use of torture and murder by state authorities for political ends had come to be regarded as an attack upon the international legal order' by the time General Pinochet seized power in 1973 (*Ex Parte Pinochet (HL 2)* at 177a).

¹³⁵⁹ *Attorney General of the Government of Israel v. Eichmann*, 36 ILR 5 (District Court of Jerusalem, 1961), *aff'd* 36 ILR 277 (Supreme Court of Israel, 1962); *Demjanjuk v. Petrovsky*, 603 F. Supp. 1468, *aff'd* 776 F. 2d 571 (6th Cir. 1985).

¹³⁶⁰ The reasoning of Lord Millett is clear and straightforward. Since the offence can only be committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, '[t]he official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence.' (*Ex Parte Pinochet (HL 2)* at 179a.)

jurisdiction over them. While doubting that customary international law recognizes universal jurisdiction over crimes of international law, Lord Phillips held that on occasion states agree by way of treaty to exercise extraterritorial jurisdiction, which, once established, should not exclude acts done in an official capacity.¹³⁶¹

While all the Lords agreed on the need for the Home Secretary to reconsider his decision on allowing extradition proceedings to go ahead, in the light of the new ruling, no one stressed that the UK has the obligation under the Torture Convention either to extradite General Pinochet to Spain or to any other country that has submitted an extradition request or to refer the case to its judicial authorities for prosecution in the UK.¹³⁶² On 15 April the Home Secretary issued an authority to proceed, thus allowing extradition proceedings to continue with regard to the remaining charges.¹³⁶³

D A Tentative Appraisal

Given the impact that the Pinochet case may have on the future development of the law of jurisdiction and jurisdictional immunities, a tentative appraisal of the way in which the House of Lords interpreted the relevant rules of international law pertaining to the case may be useful. While the decision of the House of Lords turns mainly on the application of UK law, the extensive reliance of the Law Lords on international law arguments for construing municipal law makes such

¹³⁶¹ *Ex Parte Pinochet (HL 2)* at 188J and 189a–b. Lord Phillips of MatraVERS found that no rule of international law requiring states to grant immunity *ratione materiae* for crimes of international law can be traced in state practice. Lord Phillips was the only one to object to the construction of section 20 of the SIA being applicable to acts of the head of state wherever committed. He held that the provision had to be interpreted simply to the effect of equating the position of a visiting head of state with that of the head of a diplomatic mission in the UK. In fact, other Law Lords had considered the issue but eventually found in the light of parliamentary history that the original intent to limit section 20 to heads of state ‘in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom’ had been superseded by an amendment of the Government. Lord Phillips maintained that the relevant statutory provision should be interpreted against the background of international law and consequently be limited to visiting heads of state (*ibid.*, at 191–192).

¹³⁶² The obligation is imposed by the joint operation of Art. 7 and Art. 5. By the end of 1998 several states, including Switzerland, France and Belgium, had submitted requests of extradition to the UK.

¹³⁶³ See *The Times*, 16 April 1999.

an endeavour a legitimate exercise. Indeed, recourse to international law for interpreting domestic law is the first noticeable feature of the case.¹³⁶⁴ The somewhat convoluted reasoning of some of the individual opinions, the frequent lack of clarity in framing the relevant issues as well as occasional incongruities in construing and presenting arguments should not overshadow the willingness of the Law Lords to decide the case consistently with international law standards. Secondly, the principle that individuals may be held accountable for acts which are regarded as criminal at international law was clearly asserted. Whether individual responsibility may be enforced before foreign municipal courts was thought to be an issue to be determined in casu, depending on the nature of the crime as well as on relevant international and municipal law provisions concerning enforcement, but the very outcome of the case proves that this may occur. Yet another important finding to be derived from the House of Lords decisions is that contrary to what the High Court had held, a distinction can be aptly drawn at international law between the wrongful acts of state organs and acts which for their gravity can be regarded as crimes of international law. Different consequences would be attached to the latter under international law, particularly as regards the permissibility of the exercise of extraterritorial jurisdiction over them and the inapplicability of immunity *ratione materiae* before international tribunals and, under certain circumstances, before foreign municipal courts. Overall, the frequent reference to such notions as *jus cogens*, obligations *erga omnes* and crimes of international law attests to the fact that the emerging notion of an international public order based on the primacy of certain values and common interests is making its way into the legal culture and common practice of municipal courts.

As regards the issue of immunity more specifically, a large majority of the Law Lords agreed that, while current heads of state are immune *ratione personae* from the jurisdiction of foreign courts, both civil and criminal, a plea of immunity *ratione materiae* in criminal proceedings may be of no avail to former heads of state depending on the nature of the crime. While the majority in the first

¹³⁶⁴ See *Alcom Ltd. v. Republic of Colombia* [1984] AC 580, 597 per Lord Diplock. See also the reliance of some Law Lords on *Trendtex Trading Co. v. Central Bank of Nigeria* [1977] QB 529 for the relevance of customary international law.

Appellate Committee held that this is so because acts which amount to international crimes can never be qualified as official acts performed by the head of state in the exercise of his functions, most of the Law Lords sitting in the second Committee confined their analysis to acts of torture. In the view of many of them, immunity would simply be incompatible with the provisions of the Torture Convention, which clearly indicates the official or governmental character of torture as a constituent element of the crime. Only Lord Phillips went a step further in saying that no rule of international law requires that immunity be granted to individuals who have committed crimes of international law and that the very notion of immunity *ratione materiae* cannot coexist with the idea that some crimes, in light of their gravity, offend against the very foundation of the international legal system. If one were to follow strictly the reasoning of the majority probably the plea of immunity *ratione materiae* could only be defeated by those crimes of international law which presuppose or require state action. Arguably, this would include crimes against humanity in a wider sense.

On universal jurisdiction under international law, regardless of any treaty-based regime, Lord Browne-Wilkinson maintained that torture on a large scale is a crime against humanity and attains the status of *jus cogens*, which, in turn, would justify the taking of jurisdiction by states over acts of torture wherever committed. Lord Millett went as far as to say that universal jurisdiction exists under customary international law with regard to crimes which have attained the status of *jus cogens* and are so serious and on such a scale as to be regarded as an attack on the international legal order. Lord Millett added that the increasing number of international tribunals notwithstanding, prosecution of international crimes by national courts 'will necessarily remain the norm'. This latter remark paves the way for broaching one of the most important and controversial issues underlying the proceedings against General Pinochet.

12.2 Are Municipal Courts a Proper Forum for Prosecuting Individual Crimes of International Law?

A preliminary issue to be addressed concerns the long-debated issue of whether municipal courts can be a proper forum for prosecuting crimes of international law. This problem can be framed in the more general debate on the suitability of municipal courts to enforce international law. As is known, some authors have argued that municipal courts can aptly subrogate for the scant number of enforcement mechanisms at international law.¹³⁶⁵ Others have rightly stressed that the extent to which municipal courts can apply international law depends, especially in dualist countries, on how international law is incorporated into the state's domestic legal system.¹³⁶⁶ Legal culture and individual judges' backgrounds in international law are other factors which are relevant to explaining the more or less active role that municipal courts can play in enforcing international law in different jurisdictions.¹³⁶⁷

Be that as it may, the case for having municipal courts adjudicate cases involving individual crimes of international law seems compelling. Theoretical and practical considerations mandate this solution. The very notion of crimes of international law postulates that they constitute an attack against the international community as a whole¹³⁶⁸ and, therefore, any state is entitled to punish them. On a more practical level, the absence of a permanent international criminal court makes international prosecution merely illusory. Nor can the establishment of international criminal tribunals by way of Security Council resolutions be an effective strategy of enforcement.¹³⁶⁹ Consensus within the Security Council may be difficult to reach and the creation of ad hoc judicial bodies to deal with

¹³⁶⁵ See, generally, B. Conforti, *International Law and the Role of Domestic Legal Systems* (1993); R. A. Falk, *The Role of Domestic Courts in the International Legal Order* (1964).

¹³⁶⁶ See A. Cassese, 'Modern Constitutions and International Law', 192 *RdC* (1985-III) 331.

¹³⁶⁷ R. Higgins, *Problems & Process. International Law and How We Use It* (1994), at 206 *et seq.*

¹³⁶⁸ See *Prosecutor v. Erdemovic*, Sentencing Judgment, Case No. IT-96-22-T, Trial Chamber I, 29 Nov. 1996 (108 ILR 180), defining crimes against humanity as '.... inhumane acts that by their very extent and gravity go beyond the limits tolerable to the international community, which must per force demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.' (at 193)

¹³⁶⁹ See SC Resolutions 808 and 827 (1993) and SC Resolution 955 respectively establishing, under Chapter VII of the UN Charter, the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The statutes of the two tribunals are reproduced, respectively, in 32 ILM (1993) 1192 and 33 ILM (1994) 1602.

particular situations in specific countries entails an element of selectivity in the enforcement of international criminal law which may seriously jeopardize its consolidation and further development. Even with the prospective entry into force of the International Criminal Court, the Statute of which was opened for signature last year,¹³⁷⁰ it would be unrealistic to expect that international criminal law can effectively be enforced only by international tribunals. International tribunals may play a strong symbolic role and are more likely to be perceived as an impartial forum, but prosecution by municipal courts will remain crucial.¹³⁷¹ It is of note that Article 17 of the ICC Statute somewhat defers to the jurisdiction of municipal courts, stipulating the inadmissibility of a case when the latter is being investigated or prosecuted by a state with jurisdiction over it or when the accused has already been tried for the conduct which is the subject of the complaint.¹³⁷²

Although the record of national prosecution of crimes of international law after the end of World War II is far from being satisfactory, domestic courts have lately manifested an increased activism, especially as regards the prosecution of war crimes and violations of humanitarian law during armed conflict.¹³⁷³ This

¹³⁷⁰ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, A/CONF.183/9 of 17 July 1998, reprinted in 37 ILM (1998) 999. For a comment see Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *AJIL* (1999) 22.

¹³⁷¹ See Meron, 'International Criminalization of Internal Atrocities', 89 *AJIL* (1995) 554, at 555.

¹³⁷² The Court may determine that a state is unable or unwilling genuinely to carry out an investigation or prosecution. Paras 2 and 3 of Art. 17 list the circumstances which the Court will take into account in determining the unwillingness or inability of national courts to prosecute. These factors include unjustified delays, instances in which the proceedings are not conducted independently or impartially, or when, due to the substantial collapse or unavailability of the interested state's judicial system, the state is unable to carry out the proceedings.

¹³⁷³ In 1997 the Supreme Court of Bavaria condemned one Mr Dzajic, a former Yugoslav national, for abetting murder in 14 cases and for attempting murder in another case during the conflict in former Yugoslavia (*Public Prosecutor v. Dzajic*, No. 20/96, Supreme Court of Bavaria, 3rd Strafsenat, May 23, 1997, excerpted in 1998 *Neue Juristische Wochenschrift* 392, comment by Safferling in 92 *AJIL* (1998) 528). See also the recent case in which a Swiss military tribunal tried, on the basis of the universality principle of jurisdiction, and eventually acquitted a former Yugoslav national, born in Bosnia-Herzegovina, for having beaten and injured civilian prisoners at the prisoner-of-war camps of Omarska and Keraterm in Bosnia (*In re G.*, Military Tribunal, Division 1, Lausanne, Switzerland, April 18, 1997, comment by Ziegler in 92 *AJIL* (1998) 78). A few years earlier in a decision of 25 November 1994, the Danish High Court had convicted one Mr Saric for having committed violent acts against prisoners of war in the Croat camp of Dretelj in Bosnia, in violation of the Geneva Conventions (see Maisson, 'Les premiers cas d'application des dispositions penales des Conventions de Geneve par les juridictions internes', 6 *EJIL* (1995) 260).

development has been favoured by the enactment in several jurisdictions of statutes which expressly allow the exercise of jurisdiction over this type of offence.¹³⁷⁴ With specific regard to crimes against humanity, their prosecution by domestic courts has been episodic. Despite occasional and mostly unsuccessful attempts by some countries to investigate, prosecute and punish individuals for crimes committed under past regimes in the same country,¹³⁷⁵ most prosecutions have been carried out by foreign courts. Besides the well-known Eichmann case,¹³⁷⁶ in which the Supreme Court of Israel convicted on charges of war crimes, genocide and crimes against humanity the Head of the Jewish Office of the Gestapo, who was among the principal administrators of the policy of extermination of the Jews in Europe, French courts convicted to life imprisonment for crimes against humanity Klaus Barbie,¹³⁷⁷ head of the Gestapo in Lyons and Paul Touvier,¹³⁷⁸ a French national heading the French Militia in Lyons during the Vichy regime. In another interesting case, *Regina v. Finta*,¹³⁷⁹ the Canadian High Court of Justice convicted a Hungarian national for deporting Jews during the war. The latter case is particularly interesting for it

¹³⁷⁴ Some statutes provide for universal jurisdiction over war crimes (see Articles 109–114 of the Swiss Military Penal Code); some are limited to crimes committed during World War II (War Crimes Act, 1991, ch. 13, para. 1(1) (UK)); War Crimes Amendment Act, 1989 Austl. Acts No. 3, para. 9(1) (Australia); Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, para. 1(a), as quoted in *Attorney-General of the Government of Israel v. Eichmann*, *supra* note 40; some others are more general in character and cover also crimes against humanity (see Articles 211–1 and 212–1 (amending the French Penal Code), in the annex to ‘Lois n. 92–684 du 22 Juillet 1992 portant reforme des dispositions du Code penal relatives a la repression des crimes et des delits contre le personnes’, J.O., 23 Juillet, 1992, at 9875 (France)) and Sec. 6(1.91), (1.94), (1.96) of the Canadian Criminal Code permitting the prosecution of foreign persons for crimes committed abroad against foreigners, provided that at the time of the crime Canada could exercise its jurisdiction over that person, based on his presence in Canada, and later that person is found in Canada.

¹³⁷⁵ See Ratner and Abrams, *supra* note 2, at 146 *et seq.* See also the current debate on the prosecution by Cambodia of the leaders of the Khmer Rouge, who surrendered at the end of 1998, for crimes against humanity, to which Prime Minister Hun Sen seems to have eventually consented (see *Keesing's Record of World Events*, vol. 45/1 (1999), at 42733). Under Art. VI of the Genocide Convention, to which Cambodia is a party, there is an obligation on the part of the state in which territory the acts of genocide took place to try the responsible persons. It should be noted that the crime of genocide is widely believed to attract universal jurisdiction.

¹³⁷⁶ *Attorney-General of the Government of Israel v. Eichmann*, *supra* note 40.

¹³⁷⁷ *Federation National des Deportees et Internes Resistants et Patriots and Others v. Barbie*, 78 ILR 124 (French *Cour de Cassation* 1985); 100 ILR 330 (French *Cour de Cassation* 1988).

¹³⁷⁸ 100 ILR 338 (French *Cour de Cassation* 1992). Touvier was convicted to life imprisonment for giving instructions for and thereby becoming an accomplice in the shooting of seven Jews at Rillieux on 29 June 1944, as a reprisal for the assassination of the Vichy Government Minister for Propaganda.

¹³⁷⁹ *Regina v. Finta*, Canada, High Court of Justice, 10 July 1989, 93 ILR 424.

establishes that any state may exercise its jurisdiction over an individual found in its territory, irrespective of the place where the alleged offences took place, when such offences can be categorized as crimes against humanity.¹³⁸⁰ While not unprecedented, the assertion of universal jurisdiction over crimes against humanity by domestic courts is relatively rare,¹³⁸¹ given the wide doctrinal consensus on its applicability under general international law.¹³⁸²

The practice of enforcement, briefly summarized above, highlights the importance of the Pinochet case, as one of the few cases not concerning the prosecution of crimes committed during World War II either by Nazis or by Nazi collaborators, as if the international community had deliberately chosen only to reckon with the atrocities committed at that time. In fact, the prosecution of crimes committed during the war has simply paved the way for consolidating the notion of individual accountability for crimes of international law. Current investigations concerning crimes against humanity and other human rights violations in Chile and Argentina by European courts further attest to the increasing activism of municipal courts in enforcing international criminal law.¹³⁸³

Mention should be made also of civil remedies as a complementary means of enforcement of international criminal law. In some jurisdictions civil redress may be sought by plaintiffs under particular statutes. In the United States, for instance, the Alien Tort Claims Act (ATCA)¹³⁸⁴ and the Torture Victim Protection

¹³⁸⁰ *Ibid*, at 426–427.

¹³⁸¹ See *Eichmann*, *supra* note 40; *In the Matter of Extradition of John Demjanjuk*, 776 F. 2d 571 (6th Cir., 1985) at 582–583, *cert. denied*, 457 U.S. 1016 (1986). See also the quote from the decision of the *Cour d'Appel*, reported by the *Cour de Cassation Chambre Criminelle*, in its judgment of 6 October 1983 in *Federation National des Deportees et Internes Resistants et Patriots and Others v. Barbie* (78 ILR 128): 'by reason of their nature, the crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign'.

¹³⁸² See, among others, P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., 1997), at 113; Meron, *supra* note 52, at 554 and 569; Randall, 'Universal Jurisdiction Under International Law', 66 *Texas L. Rev.* (1988) 785, at 814; *Restatement*, *infra* note 72, § 404.

¹³⁸³ See *supra* note 12.

Act (TVPA)¹³⁸⁵ provide such a remedy. Under the ATCA district courts have jurisdiction over civil actions brought by aliens for a tort only, committed in violation of the law of nations. On this basis, starting from the landmark case of *Filartiga v. Pena Irala*,¹³⁸⁶ federal courts have been able to assert their jurisdiction over tortious conduct abroad in violation of international law, particularly human rights abuses. The TVPA, in turn, provides a cause of action in civil suits in the United States against individuals who, under actual or apparent authority, or colour of law of any foreign nation, subject an individual to torture or extrajudicial killing. The record of enforcement of the two statutes bears witness to the willingness of municipal courts to implement the legislator's intent that human rights abuses be effectively punished.¹³⁸⁷

While it is arguable that customary international law requires states to punish the perpetrators of crimes of international law,¹³⁸⁸ many treaties lay down the obligation either to prosecute or extradite individuals who have committed certain offences of universal concern.¹³⁸⁹ It is unfortunate that too often states fail in

¹³⁸⁴ 28 U.S.C. (1994) § 1350.

¹³⁸⁵ 28 U.S.C. (1994) § 1350 note.

¹³⁸⁶ 630 F. 2d 876 (2nd Cir., 1980) and 577 F. Supp. 860 (EDNY, 1984).

¹³⁸⁷ *Cabiri v. Assasia Gyimah*, 921 F. Supp. 1189 (SDNY, 1996) (arbitrary detention and acts of torture); *Kadic v. Karadzic*, 70 F. 3d 232 (2nd Cir., 1995) (genocide, war crimes, torture, summary executions); *Xuncax v. Gramajo*, 886 F. Supp. 162 (DMA, 1995) (torture, arbitrary detention, summary executions and enforced disappearance); *In re, Estate of Ferdinand Marcos Human Rights Litigation*, 25 F. 3d 1467 (9th Cir., 1994) (torture, summary executions, disappearances); *Trajano v. Marcos*, 978 F. 2d 493 (9th Cir., 1992) (torture); *Paul v. Avril*, 812 F. Supp. 207 (SD Florida, 1992) (torture, cruel, inhuman and degrading treatment, arbitrary arrest and detention); *Forti v. Suarez Mason*, 672 F. Supp. 1531 (N.D. Cal., 1987) (torture, extrajudicial killings, disappearances and prolonged arbitrary detention).

¹³⁸⁸ See Condorelli, 'Le Tribunal Penal International pour l'Ex-Yougoslavie et sa jurisprudence', in Bancaja Euromediterranean, *Courses of International Law*, vol. I, (1997) 241, at 270. See also Paust, 'Individual Criminal Responsibility for Human Rights Atrocities and Sanction Strategies', 33 *Tex. Int'l L. J.* (1998) 631, at 640–641.

¹³⁸⁹ See, *inter alia*, the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (2 ILM (1963) 1042); the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking) (10 ILM (1971) 133); the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Sabotage) (10 ILM (1971) 1151); the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (16 ILM (1977) 41); the 1976 European Convention on the Suppression of Terrorism (15 ILM (1976) 1272); the 1998 International Convention on the Suppression of Terrorist Bombings (37 ILM (1998) 249). As regards specifically terrorism, whose status as an international crime remains controversial, a thorough review of the complex network of international treaties and other instances of state practice has been made recently by Kolb, 'Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflections on

applying directly the relevant treaty provisions or in enacting implementing legislation whenever this is necessary to enforce them. This is particularly true for international criminal law which often requires the enactment of ad hoc criminal rules. It would be desirable indeed that states, regardless of any particular treaty obligation, exercised their jurisdiction over acts which by the *communis opinio* are regarded as crimes of international law. Since the end of World War II states have made it clear that certain acts are attacks against the fundamental interests and values of the international community as a whole. If their statements are to be taken as more than an exercise in political rhetoric, then they must bring their legislation in conformity with international law and give domestic courts the tools to enforce its rules.¹³⁹⁰ The rule of statutory construction, widely applied in both common law and civil law jurisdictions, whereby domestic law should be interpreted as much as possible in conformity with international law, has a potential of application which should not be underestimated.¹³⁹¹ As the Pinochet case shows, the interpretation of domestic statutes in light of contemporary standards of international law may, at least in principle, remedy domestic legislation ambiguities and correctly implement the principles and rules of international law which have a bearing on the case at hand.

Status and Trends in Contemporary International Law', 50 *Revue Hellenique de Droit International* (1997) 42–88. It is of note that terrorism does not appear in the list of crimes over which the International Criminal Court (see *supra*, note 51 and accompanying text) will have jurisdiction.

¹³⁹⁰ Attention to this problem has been drawn also in the press commenting on the proceedings against Pinochet: see *The Economist*, 28 Nov.–4 Dec. 1998, at 26.

¹³⁹¹ On the rule, generally, see Conforti, 'Cours general de droit international public', 212 *RdC* (1988-V) 56–57. On the application of the rule in common law countries see F. A. Mann, *Foreign Affairs in English Courts* (1986), at 130; *Restatement (Third) of the Foreign Relations Law of the United States*, 1987, § 114. In the United States this rule of statutory construction dates back to the last century: see *The Charming Betsy*, 6 U.S. (2 Cranch) (1804) 132, 143. On the use of international human rights law to interpret domestic law, see Possner, 'Recent US and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis', 41 *Hastings L. J.* (1990) 824 and with specific regard to the United Kingdom, Higgins, 'The Role of Domestic Courts in the Enforcement of International Human Rights: the United Kingdom', in B. Conforti and F. Francioni (eds), *Enforcing International Human Rights Before Domestic Courts* (1997) 37.

12.3 What Immunity for Former Heads of State?

The immunity of heads of state in international law is a complex topic.¹³⁹² The early view that monarchs enjoy an absolute immunity has given way to other considerations. After the formation of modern states the position of head of state has radically changed and nowadays it may remarkably vary depending on the constitutional organization of the state.¹³⁹³ The immunity of heads of state may become relevant in many different ways before foreign municipal courts. It may concern current heads of state visiting officially another country or leading an official mission,¹³⁹⁴ or, regardless of their physical presence in the forum state, it may arise in connection with acts carried out by them in their own state.¹³⁹⁵ Moreover, the issue of immunity may vary depending on the nature of their activities and on the type of proceedings in which they are involved.¹³⁹⁶ As

¹³⁹² The complexity of the regime was hardly acknowledged by the House of Lords. In the first ruling of the House of Lords, all the parties agreed that current heads of state enjoy an absolute immunity. The fact that the issue was irrelevant to the case at hand may have played a role in achieving unanimity on this point of law. In the second ruling, perhaps for not too dissimilar reasons, the immunity enjoyed by current heads of state was deemed to be absolute and was described as an immunity *ratione personae*, which pertains to the particular status of the holder. The person of the head of state is inviolable and his conduct would be immune from the legal process of foreign courts regardless of the public or private nature of his acts. Lord Hope went as far as to qualify this type of immunity as a *jus cogens* norm (*Ex Parte Pinochet (HL 2)* at 149e). An immunity which is attached to the office is lost when the individual is no longer in post. All the Law Lords agreed that after loss of office the former head of state continues to be immune for official acts performed in the exercise of his authority as head of state. This immunity *ratione materiae* is of an entirely different nature from the immunity *ratione personae* enjoyed by serving heads of state. Otherwise referred to as *residual* or *functional* immunity it is meant to cover all those official activities performed by state organs in the exercise of their functions. Such acts would be more properly attributed to the state rather than to the individual organs who, in principle, could not be held accountable for them.

¹³⁹³ See Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *RdC* (1994) 9, at 21 *et seq.*

¹³⁹⁴ See the 1969 Convention on Special Missions. Heads of states are also included in the scope of application of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons.

¹³⁹⁵ See *Re Honecker* (80 ILR 365), in which the then Chairman of the Council of State of the GDR was held to be immune as head of state of a foreign country from criminal proceedings brought in the FRG against him on charges of arbitrary deprivation of liberty. See also *Saltany v. Regan*, 80 ILR 19, in which a US District Court (DC) granted head of state immunity, upon the suggestion of the executive, to the Prime Minister of the United Kingdom in an action in tort for personal injuries and damage to property brought by civilian residents of Libya, in the aftermath of the US bombing of Libya. The Prime Minister of the UK had allowed military bases in the UK to be used by US air forces for the operation against Libya. Interestingly enough, head of state immunity was also granted in the US to Prince Charles as heir to the British throne (*Kilroy v. Windsor*, 1978 Dig. U.S. Practice Int'l L. 641–643).

¹³⁹⁶ The UK State Immunity Act makes a distinction between civil proceedings, to which the general regime of state immunity under Part I is applicable, and criminal proceedings covered by Part III, Section

rightly noted, this is an area of the law 'which is in many respects still unsettled, and on which limited state practice casts an uneven light'.¹³⁹⁷

Even more troubling is the question of what, if any, immunity protects former heads of state, once they lose their office. Are they still entitled to claim immunity? If so, on what basis and for what acts should they be held immune? Should one distinguish between private acts and official acts performed in the exercise of their functions? Is the alleged criminal character of the acts committed while they were in post relevant for the purpose of immunity? Can one distinguish between offences of a different gravity? Last, would any such immunity apply to the conduct of heads of state in particular or would it rather be applicable to any foreign state's official regardless of his rank? All these issues underlined the Pinochet case. For the first time, a former head of state faced criminal proceedings in a foreign municipal court on charges concerning crimes of international law allegedly committed while he was the serving as head of state of Chile. The unique character of the case may well justify the difficulties in framing the relevant issues in their proper legal context.

As a matter of methodology, any attempt to evaluate the content of the rules concerning the jurisdictional immunities of heads of state should be made in the light of contemporary standards of international law. Reliance on precedents dating back to the last century is inherently contradictory with the asserted intention of interpreting the SIA in the light of contemporary standards of international law. Their many peculiarities notwithstanding, the Duke of Brunswick and Hatch cases were decided at a time when the unfettered deference to the status of foreign sovereigns was the obvious tribute to the

20 of the Act. The legislative history of Section 20 is fairly interesting. Originally devised to equate the position of a head of state visiting the country to that of the head of the diplomatic mission within the country, following an amendment proposed by the executive, the words which made the Act applicable to heads of states who were 'in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom' were deleted (the matter is discussed in Lord Browne-Wilkinson's opinion). Only Lord Phillips disagreed with the majority, saying that the conduct of a head of state outside the United Kingdom remains governed by the rules of public international law (see *supra* note 42).

¹³⁹⁷ See Watts, *supra* note 74, at 52.

indisputable principle of absolute respect for state sovereignty.¹³⁹⁸ Nor is the argument that the slow and uncertain progress made by the doctrine of individual crimes should yield to the long and firmly established rule of head of state immunity particularly convincing.¹³⁹⁹ In historical perspective, the opposite stance should be taken.¹⁴⁰⁰ While the development of the human rights doctrine and the principle of individual responsibility for crimes of international law have rapidly emerged as the fundamental tenets of the international community, jurisdictional immunities of foreign states and their organs have been the object of a process of steady erosion.

A closer look at recent practice shows that there is no clear-cut answer to the above queries. Immunity for heads of state and lower state officials for acts performed in the exercise of their functions has given rise to a scant and fairly inconclusive case law. While some authority supports the view that former heads of state would not enjoy immunity for their private acts during their term of office,¹⁴⁰¹ few are the cases which deal with criminal conduct amenable within

¹³⁹⁸ *Duke of Brunswick v. The King of Hanover* (1848) 2 H.L. Cas. 1 (action brought by the former reigning Duke of Brunswick against his former guardian, the reigning King of Hanover, for the latter's involvement in removing him from his ruling position and for the maladministration of his estate): 'A foreign Sovereign, coming into this country cannot be made responsible here for an act done in his Sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad ...'; *Hatch v. Baez* (1876) 7 Hun. 596 (action for injury suffered at the hands of the former President of the Dominican Republic): 'The wrongs and injuries of which the plaintiff complains were inflicted upon him by the Government of St. Domingo, while he was residing in that country, and was in all respects subject to its laws. They consist of acts done by the defendant in his official capacity of President of that Republic.... The general rule, no doubt is that all persons and property within the territorial jurisdiction of a state are amenable to the jurisdiction of its courts. But the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of the sovereignty thereof, is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law' (at 599–600); *Underhill v. Hernandez* (1897) 168 U.S. 250 (action for wrongful imprisonment brought by American citizen residing in Venezuela against the former commander of revolutionary forces which later prevailed): 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory' (at 252).

¹³⁹⁹ See Lord Slynn's opinion (*Ex Parte Pinochet (HL 1)*) at 1313), subsequently endorsed by Lord Goff (*Ex Parte Pinochet (HL 2)*) at 116h–j; 117a–d).

¹⁴⁰⁰ See Lord Millett's opinion (*Ex Parte Pinochet (HL 2)*) at 180a).

¹⁴⁰¹ Reference was made in the *Pinochet* case to the following cases: *Ex King Farouk of Egypt v. Christian Dior, S.A.R.L.*: (1957) 24 ILR 228; *Soc. Jean Desses v. Prince Farouk* (1963) 65 ILR 37; *Jimenez v. Aristeguieta*, 311 F. 2d 547 (5th Cir. 1962). For a complete and detailed account of the legal status of deposed heads of state see Decaux, 'Le Statut du Chef d'Etat Dechu', 26 *AFDI* (1980) 101. Presumably,

the range of official functions.¹⁴⁰² As Lord Phillips rightly stressed, it is difficult to provide sufficient evidence that customary international law entitles a former head of state to immunity from criminal process in respect of crimes committed in the exercise of his official functions. Most of the existing case law is concerned with civil proceedings and is strongly influenced by the content and interpretation by courts of domestic codification of state immunity and related issues. In the recent Canadian case *Jaffe v. Miller*, concerning an action in tort against a foreign state's officials for laying false criminal charges and for conspiracy to kidnap, the Ontario Court of Appeal found that immunity should be granted to them, otherwise state immunity could be easily circumvented by suing state functionaries.¹⁴⁰³ In the United Kingdom, the SIA had been recently interpreted, in the context of civil proceedings, to the effect of granting to heads of states of recognized states the same immunity the state has when the former act in their official capacity, whereas when they act in their private capacity they would be entitled to the immunities enjoyed by diplomatic agents under Section 20 of the SIA.¹⁴⁰⁴

even the type of criminal acts mentioned by way of example by Lord Steyn in the first ruling of the House of Lords (the killing of the gardener in a fit of rage or the torturing of a person for his own pleasure) could be amenable within the category of private acts.

¹⁴⁰² Counsel for Chile made reference to the case *Marcos & Marcos v. Department of Police* (102 ILR 198), in which a Swiss Federal Court held that public international law grants immunity to former heads of states, even with regard to criminal acts allegedly committed while they were in power, unless the immunity is waived by their state (which the Republic of the Philippines did in the case at hand). Perhaps reference could have been made to the *Honecker* case, in which proceedings had been brought against the former Chairman of the GDR State Council for homicide. Although the proceedings against him were discontinued after the Supreme Constitutional Court of Berlin held that the continuation of proceedings against a person who is expected to die before they come to an end is an infringement of the human dignity of the defendant, the fact that he was standing trial for acts committed while he was in post can be interpreted to the effect that he was not held immune for criminal acts performed in the exercise of his functions (*Honecker Prosecution Case* (Case No. VerfGH 55/92), Federal Republic of Germany, Supreme Constitutional Court (VerfGH) of Berlin, 12 January 1993, 100 ILR 393), although other considerations concerning the unification of Germany may explain his not being granted immunity (see Watts, *supra* note 74, at 89, note 201).

¹⁴⁰³ *Jaffe v. Miller*, [1993] 95 ILR 446, at 458–459.

¹⁴⁰⁴ See *Bank of Credit and Commerce International (Overseas) Ltd (In Liquidation) v. Price Waterhouse (A Firm) and Others*, England, High Court, Chancery Division, 5 November 1996, reported in 111 ILR 604: 'In so far as the sovereign or head of state is acting in a public capacity on behalf of that state, he is clothed with the immunity that the state has. When acting in this capacity, the head of state and the state are, to some extent, indistinguishable. On the other hand, when acting in any other capacity, it is sensible that he should have immunity equivalent to that enjoyed by the state's diplomatic staff' (at 610).

In the United States, the Foreign Sovereign Immunities Act (FSIA) does not expressly include provisions on heads of state and the Act has been deemed inapplicable by American courts to heads of states. The prevailing view seems to be that the head of state immunity is a common law doctrine applicable to the person the United States government acknowledges as the official head of state and that courts defer to the executive's determination of who qualifies as a head of state.¹⁴⁰⁵ This attitude has been recently confirmed in *Flatow v. Islamic Republic of Iran et al.*, holding that head of state immunity, regarded by the court as more a matter of grace and comity than of right, applies only to individuals qualified by the political branch of government as legitimate heads of recognized states.¹⁴⁰⁶ Immunity would also be denied if the foreign state has expressly waived it.¹⁴⁰⁷ Interestingly enough, the FSIA has been held to apply to officials of foreign states acting in their official capacity,¹⁴⁰⁸ unless the relevant acts exceed the lawful boundaries of a defendant's authority.¹⁴⁰⁹ The latter qualification was instrumental in *Cabiri v. Assasie-Gyimah*¹⁴¹⁰ to deny immunity to the Deputy Chief of National Security of Ghana for arbitrary detention and acts

¹⁴⁰⁵ See *U.S. v. Noriega*, 117 F. 3d 1206 (Court of Appeals 11th Cir., 1997); *Kadic v. Karadzic*, 70 F. 3d 232 (2nd Cir., 1995); *Alicog et al. v. Kingdom of Saudi Arabia et al.*, 860 F. Supp. 379 (SD Texas, Houston Division, August 10, 1994); *Lafontant v. Aristide*, 844 F. Supp. 128 (EDNY January 27, 1994). See also the interesting dictum of the Court in *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla, 1990), in which the court, denying head of state immunity to General Noriega, as he had never been recognized as the head of state of Panama, held that the grant of immunity is a privilege which the United States may withhold from any claimant. Furthermore, the court held that had head of state immunity been granted to Noriega 'illegitimate dictators [would be granted] the benefit of their unscrupulous and possibly brutal seizure of power' (at 1521).

¹⁴⁰⁶ 99 F. Supp. 1 (DC Columbia, 1998), in which denial of immunity to Iran, to Ayatollah Khomeini, qualified as the Supreme Leader of the Islamic Republic of Iran, and to Mr. Rafsanjani, former president of the Islamic Republic of Iran for providing material support and resources to the Shafaqi faction of the Palestinian Islamic Jihad, which caused the wrongful death of an American citizen in Israel was justified under the recent amendment to the FSIA (see *infra*, note 130 and accompanying text), which expressly provides for the denial of immunity to foreign states and their officials that facilitate terrorist activities. The statutory provision (see *infra*, note 130) overrides the common law doctrine of head of state immunity.

¹⁴⁰⁷ See *Paul v. Avril*, 812 F. Supp. 207 (SD Florida, 1993).

¹⁴⁰⁸ See *Chuidian v. Philippine National Bank*, 912 F. 2d 1095, 1103 (9th Cir., 1990). For a comment and comparison with English law see Whomersley, 'Some Reflections on the Immunity of Individuals for Official Acts', 41 *ICLQ* (1992) 848.

¹⁴⁰⁹ The FSIA was held to be inapplicable to activities not carried out under the authority of the state: see *In re Estate of Ferdinand Marcos Human Rights Litigation*, 978 F. 2d 493 (9th Cir., 1992), at 498 and *In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F. 3d at 1472.

¹⁴¹⁰ 921 F. Supp. 1189 (SDNY, April 18, 1996).

of torture against a Ghanaian citizen. Similarly, in *Xuncax v. Gramajo*¹⁴¹¹ an action brought by citizens of Guatemala against former Guatemala's Minister of Defence for acts of torture, arbitrary detention, summary executions and enforced disappearance was thought not to be barred by the FSIA, which is 'unavailable in suits against an official arising from acts that were beyond the scope of the official's authority'. While the latter case law is of some relevance to our analysis for the distinction it draws between official acts and acts which exceed the lawful boundaries of official authority, it should be stressed that both cases relate to civil proceedings.¹⁴¹² Although there seems to be no case law on this specific point, it is fair to presume that heads of state would also be entitled to the residual immunity provided by the FSIA.¹⁴¹³

As recent studies purport, apart from the case of the immunity of diplomats and consuls for their official (and authorized by the territorial state) activities, it is difficult to establish the existence, under customary international law, of either a general regime of residual or functional immunity for high and low rank foreign state officials for acts performed in the exercise of their functions, or an ad hoc rule on heads of state.¹⁴¹⁴

On the other hand, considerable support can be drawn from state practice to maintain that individuals are accountable for crimes of international law regardless of their official position. Besides the well-known quotes from the Nuremberg judgment,¹⁴¹⁵ many provisions can be traced in treaties proscribing

¹⁴¹¹ 886 F. Supp. 162 (DMA, April 12, 1995).

¹⁴¹² On issues of immunity and justiciability in the United States involving foreign heads of states see also Paust, 'It's No Defense: *Nullum Crimen*, International Crime and the Gingerbread Man', 60 *Albany Law Review* (1997) 657, at 658 *et seq.* On the availability of civil remedies for grave violations of human rights see Damrosch, 'Enforcing International Law through Non-forcible Measures', 269 *RdC* (1997) 13, at 155 *et seq.*

¹⁴¹³ On the uncertain status of head of state immunity in the United States see Mallory, 'Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings', 86 *Columbia Law Review* (1986) 169.

¹⁴¹⁴ P. De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (1996).

¹⁴¹⁵ 'The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings ... individuals have international duties which transcend the national obligations of

specific crimes¹⁴¹⁶ as well as in the statutes¹⁴¹⁷ and practice of international tribunals¹⁴¹⁸ to the effect that no plea of immunity is available in case of crimes of international law. The principle was endorsed also by the Israel Supreme Court in the judgment against Eichmann.¹⁴¹⁹ Most recently, the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Furundzija* held that the principle that individuals are personally responsible for acts of torture, whatever their official position, even if they are heads of state or government ministers, is 'indisputably declaratory of customary international law'.¹⁴²⁰ Nor does the argument that the responsibility of heads of state and other government officials for crimes of international law can only be enforced before international tribunals carry much force with it.¹⁴²¹ Besides the difficulty of establishing international criminal tribunals, it would be odd indeed, were the international normative standards to vary depending on the court which has to apply them.

Even if one is not convinced that the above instances of state practice can be persuasively interpreted to the effect of demonstrating the existence of a positive rule which requires states not to grant immunity to heads of state in cases in

obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law' (22 *Trial of the Major War Criminals Before the International Military Tribunal* (1949) 466).

¹⁴¹⁶ See, for instance, Art. IV of the Convention for the Prevention and Punishment of the Crime of Genocide (1948).

¹⁴¹⁷ See Art. 7 of the Nuremberg Charter (1945); Art. 2 of the Allied Control Council Law No. 10 (1945); Art. 6 of the Tokyo Charter (1946); Principle III of the Principles of Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (UN Doc. A/1316 (1950), reprinted in 4 *AJIL* (1950) 126); Art. 7(2) of the Statute of the International Tribunal for Former Yugoslavia (1993); Art. 6(2) of the Statute of the International Criminal Tribunal for Rwanda (1994); Art. 7 of the UN Draft Code of Offences against the Peace and Security of Mankind (1996) and Art. 27 of the Statute of the International Criminal Court (1998). It is also of note that, according to the UN Secretary General's Report to the Security Council, pursuant to SC Res. 808 (1993), concerning the establishment of an International Criminal Court, there was universal consensus among states that the Statute of the Court should contain provisions providing for the personal criminal responsibility of heads of state, government officials and other persons acting in an official capacity (UN Doc. S/25704, 3 May 1993, para. 55).

¹⁴¹⁸ Top political leaders and high military commanders have been indicted by the ICTY (see *Prosecutor v. Karadzic & Mladic*, No. IT-95-18-I, Indictment (14 Nov. 1995) and the former Prime Minister of Rwanda, Kambanda, has been recently convicted to serve a life term in prison for crimes against humanity (see *Prosecutor v. Kambanda*, No. ICTR 97-23-9, 4 Sept. 1998, reprinted in 37 *ILM* (1998) 1411).

¹⁴¹⁹ *Attorney General of Israel v. Eichmann*, *supra* note 40, at 47-48.

¹⁴²⁰ *Prosecutor v. Anto Furundzija*, *supra* note 32, at para 140.

¹⁴²¹ See Watts, *supra* note 74, at 82.

which the commission of crimes of international law is involved, the same conclusion could be reached via a different reasoning. It is not infrequent that courts have to decide cases for which there is no precedent or where no established or accepted rule comes in handy to provide the rule of decision. In any such case, the court ought to interpret the law systematically and in accordance with what are perceived as the basic principles and goals of the legal system it is called upon to interpret. The more the rule of decision is grounded on and consistent with accepted general principles, the more the decision will be perceived as legitimate and fair. In many respects, this is the type of analysis which several Law Lords endeavoured to carry out. The divide between the Law Lords sitting in the first Appellate Committee is evidence of the sense of uncertainty over which values and principles should be accorded priority in contemporary international law. The two opposite poles of the spectrum are evident. On the one hand, there stands the principle of sovereignty with its many corollaries including immunity; on the other, the notion that fundamental human rights should be respected and that particularly heinous violations, be they committed by states or individuals, should be punished. While the first principle is the most obvious expression and ultimate guarantee of a horizontally-organized community of equal and independent states, the second view represents the emergence of values and interests common to the international community as a whole which deeply cuts across traditional precepts of state sovereignty and non-interference in the internal affairs of other states. The two views are not mutually exclusive. Occasionally, however, they may come to clash as the interests and values they support are remarkably different. This is all the more likely when no established rule exists to provide the rule of decision in a case and courts have to make recourse to general principles to fill in the lacunae or to interpret controversial points of law.

The inconsistency of the very notion of crimes of international law with any form of immunity which shields individuals behind the screen of their official position is apparent. Immunity as a form of protection which international law grants, under certain circumstances, to particular categories of individuals is incompatible with conduct which runs counter to the fundamental principles of the international

legal system. The argument is one of logic. International law cannot grant immunity from prosecution in relation to acts which the same international law condemns as criminal and as an attack on the interests of the international community as a whole. Nor can the principle of sovereignty, of which immunity is clearly a derivative, be persuasively set forth to defeat a claim based on an egregious violation of human rights.¹⁴²² As the ICTY held in *Tadic*, '[it] would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights'.¹⁴²³ The compelling force of the argument cannot be limited to cases involving the immunity *ratione materiae* of former heads of state or other state officials. The alleged commission of international law crimes should also dispose of a claim of immunity *ratione personae*.¹⁴²⁴ Were it not so, one would be left with the impression that it is power more than law which protects office holders and that no matter whether they place themselves well beyond the legitimate boundaries of their official authority, they will be protected by law as long as they retain their power, whereas they will be left to their fate once that power comes to an end.¹⁴²⁵ Incidentally, the need to reassess the scope of diplomatic

¹⁴²² Besides the well-known dicta of the Nuremberg Tribunal (see *supra* note 96), see also *Prosecutor v. Erdemovic*, *supra* note 49 in which the Trial Chamber of the ICTY characterized crimes against humanity as crimes which 'transcend the individual, because when the individual is assaulted, humanity comes under attack and is negated' (at 149).

¹⁴²³ *Prosecutor v. Tadic*, Decision on Jurisdiction (Appeals Chamber), Judgment of 2 October 1995, 105 ILR 453, at 483.

¹⁴²⁴ While extensive reliance was placed on Sir Arthur Watts Hague Lectures on the position of heads of states in international law, particularly where he recognizes that heads of states may be personally held accountable for 'international crimes which offend against the public order of the international community', no heed was paid to the circumstance that this statement was not confined to the position of heads of state after loss of office.

¹⁴²⁵ See Decaux, *supra* note 82, at 139: '*La moralisation du droit international trouve tres vite ses limites. Se contenter de mettre en accusation les souverains dechus, c'est oublier la responsabilite des Chefs d'Etat au pouvoir. Seul un paradoxe permet de dire que le chef d'Etat criminel perd toutes ses immunités de juridiction parce qu'il est criminel: il les perd parce qu'il est vaincu et detrone. C'est le pouvoir qui le protegeait, non le droit. Et, le pouvoir dechu, l'ancien chef d'Etat se trouve soumis à la lois du vainquer.*' Given the extreme fragmentation of the legal position of former heads of state, Decaux expressed the need for international law to fix general standards to direct state practice. Although sceptical, he acknowledged that agreement could be reached as regards the punishment of crimes of international law as defined in Nuremberg (*ibid*).

immunities for violations of human rights had been signalled long before the Pinochet case.¹⁴²⁶

The objection can be raised that denial of immunity may cause misguided or even malicious allegations to be brought against heads of state or lower state officials.¹⁴²⁷ While it would be simplistic to reject such a concern as unfounded, the point can be made that several instruments exist to limit vexatious claims. First, immunity should only be denied in relation to offences recognized as crimes of international law. Secondly, such remedies as sanctions against frivolous claims and such instruments of judicial administration as the discretionary power of prosecutors to start proceedings could be aptly used at the domestic law level to reduce the alleged risk.¹⁴²⁸ In any event, practical considerations, however important, cannot by themselves direct a change in the interpretation of the law to the detriment of the primary value of securing respect for some fundamental aspects of human dignity.

A last note concerns the link established in the opinion of some of the Law Lords between immunity, crimes of international law and universality of jurisdiction. To hold that under customary international law there can be no immunity for crimes of international law and that the exercise of extraterritorial jurisdiction over certain grave offences is permitted on the basis of the universality principle does not exclude that immunity can be granted by treaty or, unilaterally, by states on the basis of either municipal legislation or considerations of comity and international courtesy to visiting heads of state. However, if one characterizes the prohibition of torture and, arguably, other crimes of international law as norms of *jus cogens*, it becomes difficult to argue that immunity, whatever its legal basis, can coexist with them. As was argued in *Siderman*, quoted and relied upon by some Law

¹⁴²⁶ See Orrego Vicuna, 'Diplomatic and Consular Immunities and Human Rights', 40 *ICLQ* (1991) 34, holding that 'by no standard can such acts [the violation of human rights] be considered as part of the diplomatic function, and thus neither can be considered an official act' (at 47).

¹⁴²⁷ This concern was expressed by Lord Goff of Chieveley in his opinion (see *supra* note 31).

¹⁴²⁸ See the decision of the Amsterdam Public Prosecutors Department not to initiate proceedings against General Pinochet while on a private visit to Amsterdam. The decision, appealed by the Dutch branch of the Chile Committee, was upheld by the Court of Appeal (see 28 *Netherlands Yearbook of International Law* (1997) 363).

Lords in the second ruling on the Pinochet case, since *jus cogens* norms enjoy the highest status within international law, they prevail and invalidate other rules of international law.¹⁴²⁹ It is perhaps not unfair to speculate that some of the Law Lords, whose reasoning on the characterization of the prohibition of torture as a *jus cogens* norm may have been influenced also by the recent *Furundzija* case,¹⁴³⁰ did not fully grasp the consequences of qualifying a rule of international law as peremptory.

12.4 The Inconsistency between Head of State and State Immunity

State immunity and the immunity *ratione materiae* enjoyed by heads of state are closely intertwined doctrines, as a large majority of the Law Lords acknowledged. Given such a close link, one may wonder what impact, if any, the decision of the House of Lords will have on the future development of the law of state immunity. As is known, foreign sovereign immunity is a doctrine of international law, whose origins remain uncertain. While many maintain that the doctrine is grounded on the principle of sovereign equality and independence of states, authoritative commentators have traced its origin to heads of state immunity, at a time in which the state and the sovereign coincided.¹⁴³¹ With the formation of modern states, the entitlement to immunity was passed to the state and to its agents and instrumentalities. According to the mainstream of legal scholarship, the jurisdictional immunity of states before foreign municipal courts used to be absolute. Only when governments and their agencies became frequently involved in international trade and finance did the law change. Particularly, due to the judicial activism of some municipal courts, immunity started being denied for private or commercial acts of the foreign state. At some point, in order to facilitate the task of domestic courts in determining which acts of the foreign states should be qualified as private or commercial, the law of state immunity was codified by statute in many jurisdictions. All domestic statutes list a series of exceptions,

¹⁴²⁹ *Susana Siderman de Blake et al. v. the Republic of Argentina*, 965 F. 2d 699 (9th Cir., 1992), at 717. *Accord Smith v. Libya*, 101 F. 3d 239 (2nd Cir., 1996), at 243.

¹⁴³⁰ See *Prosecutor v. Anto Furundzija*, *supra* note 32, discussing the consequences at both state and individual levels of the qualification of torture as a *jus cogens* norm (see, esp. paras 153–157).

¹⁴³¹ See Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *BYIL* (1951) 220.

mainly, though not exclusively,¹⁴³² concerned with private and commercial transactions, and retain immunity as the general rule.¹⁴³³

When individuals started seeking redress for violations of human rights before domestic courts against foreign states, mainly alleging acts of torture by state officers, domestic courts were bound to apply the residual rule of immunity under their domestic legislation. While lower courts, especially in the United States, had resorted to a variety of interpretative devices to avoid granting state immunity to foreign violators of human rights,¹⁴³⁴ in 1993 the Supreme Court in *Nelson* held that, however monstrous, acts of torture by police officers are by definition sovereign acts and as such they entitle the foreign state to immunity.¹⁴³⁵ The binding force of the Supreme Court precedent has caused lower courts, although in some cases reluctantly,¹⁴³⁶ to adjust their case law accordingly. In 1996 the English Court of Appeal (Civil Division) reached the same conclusion in *Al Adsani*, concerning the torture of a dual British/Kuwaiti national by Kuwaiti officials in Kuwait.¹⁴³⁷ In both cases the upholding of the claim to immunity was thought to be prompted by the plain and unambiguous text of the relevant statutes on state immunity.¹⁴³⁸ Particularly in the United Kingdom, the rule of

¹⁴³² The most notable exception is the so-called ‘tort exception’, which allows denying immunity to foreign states for their illegal acts which cause death or personal injury or loss of or damage to property in the forum state. Occasionally, this exception has been applied to cases of political assassination allegedly committed by the foreign state in the forum: see *Letelier v. Republic of Chile*, 488 F. Supp. (1980) and *Liu v. Republic of China*, 892 F. 2d 1419 (9th Cir., 1989).

¹⁴³³ The best account of the development of the international law of state immunity, with particular regard to recent developments, remains C. H. Schreuer, *State Immunity: Some Recent Developments* (1988).

¹⁴³⁴ Such practice is reviewed in Bianchi, ‘Denying State Immunity to Violators of Human Rights’, 46 *Austrian J. Publ. Int’l L.* (1994) 195.

¹⁴³⁵ *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993), at 1480.

¹⁴³⁶ See *Susana Siderman de Blake et al. v. the Republic of Argentina*, *supra* note 110: ‘when a state violates *jus cogens*, the cloak of immunity provided by international law falls away, leaving the State amenable to suit’ (at 718). See also *Smith v. Libya*, *supra* note 110, recognizing that, as a matter of international law, state immunity would be abrogated by *jus cogens* norms (at 244).

¹⁴³⁷ *Al Adsani v. Government of Kuwait*, England, Court of Appeal, 12 March 1996 (107 ILR 536).

¹⁴³⁸ In the United States the Supreme Court before *Nelson* had already authoritatively determined that violations of international law not expressly mentioned in the FSIA are not admissible exceptions to the general rule of immunity (see *Argentine Republic v. Amerasia Shipping Co.*, 488 U.S. 428, 109 S. Ct. 683, 102 L. Ed. 818 (1989)). For a comment see Bianchi, ‘Violazioni del diritto internazionale ed immunità

statutory construction, whereby Parliament cannot be presumed to have legislated contrary to the international obligations of the United Kingdom, can only be triggered by the unclear or ambiguous character of the relevant statutory provisions.¹⁴³⁹

The *Al Adsani* case was relied on by Lord Bingham in the Divisional Court to maintain that '[i]f the Government there could claim immunity in relation to alleged acts of torture, it would not seem surprising if the same immunity could be claimed by a defendant who had at the relevant time been the ruler of that country'.¹⁴⁴⁰ In fact, after the ruling of the House of Lords there should be no surprise if the argument is reversed. The Law Lords, with a few exceptions,¹⁴⁴¹ generally regarded the above case law as irrelevant for its being concerned exclusively with civil proceedings.¹⁴⁴² Some of them, however, recognized, although without enthusiasm, that there is some authority to maintain that in the field of civil litigation immunity should be granted to state officials, regardless of the lawful character of their conduct.¹⁴⁴³ Presumably, after the Pinochet case, while state and state officials would continue to be held immune in civil proceedings in the United Kingdom for acts of torture and, arguably, other crimes of international law, as regards criminal proceedings they might be held accountable and no plea of immunity might be available to them.¹⁴⁴⁴ To the

degli Stati dalla giurisdizione civile negli Stati Uniti: il caso *Hercules*', 72 *Rivista di diritto internazionale* (1989) 546).

¹⁴³⁹ The rule has been restated recently in *R. v. Secretary of State for the Home Department ex Parte Brind* [1991] 1 AC 696. As Ward LJ put it: 'Unfortunately the Act is as plain as it can be. A foreign state enjoys no immunity for acts causing personal injury committed in the United Kingdom and if that is expressly provided for the conclusion is impossible to escape that state immunity is afforded in respect of acts of torture committed outside the jurisdiction.' (*Al Adsani v. Government of Kuwait*, *supra* note 118, at 549).

¹⁴⁴⁰ *Ex Parte Pinochet* (High Court), *supra* note 6, at para. 73.

¹⁴⁴¹ Lord Lloyd (*Ex Parte Pinochet* (HL 1) at 1324) quoted *Al Adsani* and *Siderman* to hold that allegations of torture may not trump a plea of immunity.

¹⁴⁴² See, for example, the opinions of Lord Nicholls (*Ex Parte Pinochet* (HL 1) at 1331) and Lord Hutton (*Ex Parte Pinochet* (HL 2) at 158c-d).

¹⁴⁴³ See Lord Phillips (*Ex Parte Pinochet* (HL 2) at 187f), quoting the 'impressive, and depressing' list of cases in which the immunity of the foreign state has been upheld in cases concerning serious human rights violations.

¹⁴⁴⁴ See the opinion of Lord Millett, *Ex Parte Pinochet* (HL 2) at 179f-j. Lord Millett saw nothing wrong in drawing the distinction between civil and criminal proceedings and noted that 'the same official or

present writer this creates a manifest inconsistency which ought to be remedied by denying immunity also to state and state officials in civil proceedings.

The pros and cons of having domestic courts adjudicating cases involving the international responsibility of states have been highlighted by scholars.¹⁴⁴⁵ It is not within the scope of this paper to reopen that debate.¹⁴⁴⁶ It will suffice here to note that the argument that the immunity *ratione materiae* of state officials is necessary not to circumvent the immunity of the state can be used to maintain that once it is held that no plea of immunity is available to state officials for crimes against international law which presuppose or require state action, the immunity of the state can be easily circumvented by bringing criminal proceedings against state officials. Nor is the argument that the degree of interference would be higher if the state is directly impleaded particularly persuasive. For such systematic and massive violations of human rights as the ones allegedly committed by General Pinochet close and extensive scrutiny of state policies and actions is required. Ultimately, any argument based on state sovereignty is inherently flawed. First, external scrutiny of state action as regards human rights is permitted under contemporary standards of international law and sovereignty can no longer be invoked to justify human rights abuses. Secondly, and perhaps most importantly, human rights atrocities cannot be qualified as sovereign acts: international law cannot regard as sovereign those acts which are not merely a violation of it, but constitute an attack against its very foundation and predominant values.¹⁴⁴⁷ Finally, the characterization of the prohibition of

governmental character of the acts which is necessary to found a claim to immunity *ratione materiae*, and which still operates as a bar to the civil jurisdiction of national courts, was now to be the essential element which made the acts an international crime' (*ibid*, at 175a). Before the *Pinochet* case, the inconsistency between allowing extraterritorial jurisdiction over acts of torture committed by individuals and upholding immunity for acts of torture in the context of civil proceedings against foreign states had been noticed by Marks, 'Torture and the Jurisdictional Immunities of Foreign States', 8 *Cambridge Law Journal* (1997), at 10.

¹⁴⁴⁵ A particularly exhaustive account of the reasons why domestic courts should not be permitted to exercise jurisdiction over foreign states for acts of torture in defiance of state immunity is given by Garnett, 'The Defence of State Immunity for Acts of Torture', 18 *Australian Yearbook of Int'l Law* (1997) 97.

¹⁴⁴⁶ The views of this writer were expressed in Bianchi, *supra* note 115.

¹⁴⁴⁷ See also Higgins, *supra* note 72, at 53: 'Acts in the exercise of sovereign authority (*acta jure imperii*) are those which can only be performed by states, but not by private persons. Property deprivation might fall in this category; torture would not.' (footnote omitted).

torture and other egregious violations of human rights as *jus cogens* norms should have the consequence of trumping a plea of state immunity by states and state officials in civil proceedings as well. As a matter of international law, there is no doubt that *jus cogens* norms, because of their higher status, must prevail over other international rules, including jurisdictional immunities.

If interpretative techniques are of no avail in securing the adjustment of domestic law to contemporary standards of international law, it would be desirable that in those countries where domestic laws have, perhaps inadvertently,¹⁴⁴⁸ had the effect of granting immunity, the law should be amended accordingly.¹⁴⁴⁹

12.5 Crimes of International Law and Non-justiciability

Contrary to foreign sovereign immunity, act of state is a domestic law doctrine of judicial self-restraint whereby domestic courts will abstain from passing judgment over the acts of a foreign sovereign done in its own territory. This doctrine

¹⁴⁴⁸ The use of the adverb is not fortuitous. It seems unlikely that at the time of enactment of the relevant statutes, domestic legislators were aware of the possibility that foreign states would be sued for serious violations of human rights before domestic courts. Furthermore, as rightly observed by some commentators, the choice of leaving immunity as the residual rule of general applicability is questionable as a matter of international law (see Sucharitkul, 'Developments and Prospects of the Doctrine of State Immunity. Some Aspects of the Law of Codification and Prospective Development', 29 *Netherlands Int'l L. Rev.* (1982) 252; Higgins, 'Certain Unresolved Aspects of the Law of State Immunity', 29 *Netherlands Int'l L. Rev.* (1982), at 265 *et seq.*).

¹⁴⁴⁹ See the recent amendments to the Foreign Sovereign Immunities Act: Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104–132, Title II, § 221(a), (April 24, 1996), 110 Stat. 1241, codified at 28 U.S.C.A. 1605), creating an exception to immunity 'for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign State while acting within the scope of his or her office, employment, or agency' (§ 1605(a)(7)). It is unfortunate that the amendment applies only to the immunity of those states that are currently designated by the Department of State as states sponsors of terrorism (Cuba, Syria, Iraq, Lybia, Sudan and North Korea), when the act has been committed outside the foreign state and when the claimants and victims are US nationals. Recently a further amendment to § 1605 (a)(7) has made punitive damages available in actions brought under the state-sponsored exception to immunity (see Civil Liability for Acts of Terrorism (September 30, 1997), enacted as part of the 1997 Omnibus Consolidated Appropriations Act, Pub. L. 104–208, Div. A, Title I § 101(c), 110 Stat. 3009–172, reprinted at 28 U.S.C. § 1605 note). This latter amendment is known as the Flatow Amendment. For the first judicial applications of the above amendments to the FSIA see *Alejandro v. The Republic of Cuba*, 996 F. Supp. 1239 (SD Florida, 17 December 1997)(concerning Cuba Air Force's extrajudicial killing of pilots of civilian aircrafts flying above international waters); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (DC Columbia, 11 March 1998) (wrongful death of US citizen in Israel resulting from an act of state-sponsored terrorism); *Cicippio v. Islamic Republic of Iran*, (DC Columbia, 27 August 1998) (tortious injuries suffered by US citizens kidnapped, imprisoned and tortured by agents of Iran in Beirut).

generally applies to the merits of the case and can be pleaded by anyone regardless of the status of the defendant in the instant case.¹⁴⁵⁰ While there might be international law underpinnings to the doctrine, the modern view is that act of state is neither a rule of international law nor is its application mandated by the international legal system.¹⁴⁵¹

The doctrine, not unknown in civil law countries,¹⁴⁵² has mainly developed in common law jurisdictions. Although cross-references between the case law of their respective courts is frequent, the doctrine has taken up different connotations in the United States and in the United Kingdom.¹⁴⁵³

Despite early assertions of the doctrine in fairly sweeping terms,¹⁴⁵⁴ its scope of application in the United States has been remarkably narrowed down over the years. An increasing number of exceptions to its operation has been conceived since the seminal *Sabbatino* case¹⁴⁵⁵ and, recently, the US Supreme Court in *Environmental Tectonics*¹⁴⁵⁶ has restricted its scope of application to cases

¹⁴⁵⁰ *Contra*, see the submission of Iraqi Airways Co. (Mr Plender, counsel) in *Kuwait Airways Corp. v. Iraqi Airways Co.* (House of Lords), 1 WLR 1147 at 1164 ff., according to which the principle of non-justiciability, as set forth by the House of Lords in *Buttes* (see *infra*, note 141, and accompanying text) would be one which limits the jurisdiction of courts, rather than operating as a substantive defence.

¹⁴⁵¹ See A. Watts and R. Jennings (eds), *Oppenheim's International Law* (9th ed., 1992), at 369. That the act of state doctrine is not a general rule of international law was held by the German *Bundesverfassungsgericht* in the *Border Guards* case (100 ILM 364 at 372).

¹⁴⁵² See Conforti, *supra* note 46, at 20 *et seq.*; Weil, 'Le controle par les tribunaux nationaux de la liceite internationale des actes des Etats etrangers', *Annuaire Français de Droit International* (1971), at 9 *et seq.*; P. Kinsch, *Le fait du prince etranger* (1994), esp. at 384 *et seq.*

¹⁴⁵³ Singer, 'The Act of State of the United Kingdom: An Analysis with Comparison to the United States', 75 *AJIL* (1981), at 283 *et seq.*

¹⁴⁵⁴ See the classical formulation of the act of state doctrine by the US Supreme Court in *Underhill v. Hernandez* (168 U.S. 250 (1897) at 252): 'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.' Quite curiously, the Supreme Court took almost *verbatim*, but without quoting, a passage of the House of Lords in *Duke of Brunswick v. King of Hanover* (1848) 2 H.L. Cas. 1, at 17 (Lord Cottenham).

¹⁴⁵⁵ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). The *Sabbatino* litigation arose from the action brought by a Cuban state-owned bank seeking recovery of sugar delivered to a US purchaser that had refused to pay, alleging, *inter alia*, that the bank lacked title to the property, as the sugar had been expropriated by Cuba in violation of international law.

requiring courts to ascertain the validity of the sovereign acts of foreign states. As regards more specifically human rights, it is arguable whether a specific exception to the application of the doctrine has emerged.¹⁴⁵⁷ The Restatement (Third) of the Foreign Relations Law of the United States maintains that any plea based on act of state would probably be defeated in cases involving violations of human rights, as human rights law permits external scrutiny of states' conduct.¹⁴⁵⁸

It is quite interesting to note that US lower courts, in order to avoid the application of both the foreign sovereign immunity and the act of state doctrines, have drawn a distinction between official and unofficial public acts. Certain crimes such as torture and other clearly established violations of fundamental human rights could not be regarded as official public acts of a foreign state. Regardless of the colour of authority under which state organs act when committing such crimes, their acts cannot be qualified as governmental, as foreign states are unlikely to have enacted legislation or overtly adopted policies to direct their organs to violate human rights.¹⁴⁵⁹

In the United Kingdom the scope of application of the doctrine seems wider than in the United States. The modern English version of the act of state doctrine was formulated in fairly sweeping terms by Lord Wilberforce in the *Buttes Gas* case in the early 1980s. According to Lord Wilberforce, there would be in English law a

¹⁴⁵⁶ *W.S. Kirkpatrick v. Environmental Tectonics* 493 U.S. 400 (1990). The case concerned two US companies bidding for a Nigerian defence contract. Allegedly, one bidder had paid bribes to Nigerian government officials. The other company filed a federal antitrust and RICO action against the former successful bidder.

¹⁴⁵⁷ On the numerous exceptions to the application of the act of state doctrine in the United States see G. B. Born, *International Civil Litigation in United States Courts* (3rd ed., 1996) at 729 *et seq.*

¹⁴⁵⁸ *Restatement (Third)*, *supra* note 72, § 443, Comment c: 'A claim arising out of an alleged violation of fundamental human rights . . . would . . . probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.'

¹⁴⁵⁹ See, *inter alia*, *Filartiga v. Peña Irala*, 630 F. 2d 876 (2nd Cir., 1980); *Forti v. Suarez Mason*, 672 F Supp 1531 (ND Cal., 1987); *Evans et al. v. Avril*, 812 F Supp 207 (SD Florida, 1993); *Kadic v. Karadzic*, 70 F. 3d 232, (2nd Cir., 1995). See also *Liu v. Republic of China*, 892 F. 2d 1419 (9th Cir., 1989). For a similar reasoning applied in the context of the applicability of the FSIA see *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (SDNY, April 18, 1996) and *Xuncax v. Gramajo*, 886 F. Supp. 162 (DMA, April 12, 1995).

general principle of judicial abstention, inherent in the very nature of the judicial process, which would prevent courts from adjudicating directly on the transactions of foreign sovereign states.¹⁴⁶⁰ This all-encompassing principle of non-justiciability is rather unique as it precludes judicial scrutiny of any transactions between foreign states. Since the doctrine applies to transactions of foreign states which have a direct bearing on the private claims before the court, the practical effect of holding such issues non-justiciable is to prevent the courts from discharging their natural function of administering the law. Although the doctrine is probably a derivative of foreign sovereign immunity in its early absolute version, its consistency could be aptly disputed in light of the many instances in which courts are allowed to rule upon transactions between a state and a private party.¹⁴⁶¹

From the different perspective of conflict of laws, UK courts in *Oppenheimer* had refused to give effect in the forum on grounds of public policy to the 1941 Nazi decree depriving German Jews residing abroad of German citizenship and confiscating their properties.¹⁴⁶² The House of Lords held that 'so grave an infringement of human rights' should lead to the refusal of recognition of the German decree as law.¹⁴⁶³ More importantly for our purposes, the House of Lords, while acknowledging that judges ought to be cautious in refusing recognition of foreign laws in matters in which the foreign state clearly has jurisdiction – as they may not have adequate knowledge of the circumstances in which legislation was passed and may cause embarrassment to the executive branch of government in the field of foreign relations – unambiguously stated to be the public policy of the United Kingdom to give effect to clearly established rules of international law.¹⁴⁶⁴ While limited to defining public policy as a limit to the operation of foreign laws in the United Kingdom, this passage from

¹⁴⁶⁰ *Buttes Gas v. Hammer* (Nos. 2 & 3), [1981] 3 All ER 616 at 628; (no. 3) [1982] AC 888 at 931 *et seq.* *Accord, J.H. Rayner Ltd. v. Department of Trade* (House of Lords) [1989] 3 WLR 969 at 1001–1002.

¹⁴⁶¹ Higgins, *supra* note 48, at 212–213.

¹⁴⁶² *Oppenheimer v. Cattermole* 1976 AC 249.

¹⁴⁶³ *Ibid*, at 278.

¹⁴⁶⁴ *Ibid*, at 277–278.

Oppenheimer seems to imply that UK courts would generally enforce international law rules, provided that they have been duly incorporated into the legal system and that no act of Parliament conflicts with them. It is somewhat surprising that Lord Steyn, who stated that 'the act of state doctrine depends on public policy as perceived by the courts in the forum at the time of the suit', did not rely on Oppenheimer to support his view.¹⁴⁶⁵

The dicta of the Law Lords in the first Pinochet case, touching upon the non-justiciability doctrine, proved that Buttes is the controlling precedent as far as the application of the doctrine in the UK is concerned. The Law Lords in the majority, while acknowledging that no justiciability issue had actually arisen in the case at hand, held that any plea based on act of state would be defeated by parliamentary intent.¹⁴⁶⁶ By enacting legislation implementing both the Convention against Torture and the Convention on the Taking of Hostages, the British Parliament had clearly intended that UK courts could take up jurisdiction over foreign governmental acts.¹⁴⁶⁷ Moreover, Lord Steyn, in language reminiscent of the recent case law developed by US courts, added that the high crimes with which General Pinochet had been indicted could not be regarded as official acts performed in the exercise of the functions of a head of state and therefore could not trigger the non-justiciability doctrine.¹⁴⁶⁸ While the doctrine was given less consideration in the second judgment of the House of Lords, Lord Saville held that any plea based on act of state or non-justiciability must fail because the parties to the Torture Convention, which expressly prohibits torture by state officials, have accepted that foreign domestic courts may exercise jurisdiction over the acts of their organs in violation of the Convention. Lord Millett, in turn, by holding that the immunity *ratione materiae* denied to Pinochet for the acts in question is almost indistinguishable from the act of state doctrine, indirectly agreed that the doctrine was of no avail in the case at hand.

¹⁴⁶⁵ *Ex Parte Pinochet (HL 1)*, at 1338.

¹⁴⁶⁶ *Ex Parte Pinochet (HL 1)*, at 1332 and 1338.

¹⁴⁶⁷ See, esp., Criminal Justice Act 1988 as regards acts of torture and Taking of Hostages Act 1982. While the former expressly permits the scrutiny of state officials' conduct, parliamentary intent was indirectly inferred from the latter in the light of the type of situations the act covers.

¹⁴⁶⁸ *Ex Parte Pinochet (HL 1)*, at 1338.

Neither the act of state nor other related judicial self-restraint doctrines should stand in the way of adjudicating cases involving individual crimes of international law.¹⁴⁶⁹ It is widely believed that the doctrine originates from and is grounded on separation of powers concerns. In particular, a ruling by domestic courts on foreign policy issues might embarrass the executive branch of government in the conduct of foreign relations and trespass on its prerogatives. Furthermore, its application would be required especially when international normative standards are unclear.¹⁴⁷⁰ In the view of this writer there cannot be any embarrassment by the executive, nor any prejudice to its prerogatives, when domestic courts are called upon to enforce clear and unambiguous standards, which are shared by the international community as a whole.¹⁴⁷¹ To hold the contrary view would amount to an acknowledgement that the wide support manifested by states to both human rights and international criminal law instruments is nothing but political propaganda. Finally, even if one identifies the rationale of the rule with the same principle of respect for the independence and sovereign equality of foreign states which also inspires the foreign sovereign immunity doctrine, compelling reasons exist to hold the doctrine inapplicable. To prevent the adjudication of the merits of a case on grounds of non-justiciability, once the jurisdictional bar of immunity has been done away with, would have the effect, hardly justifiable as a matter of logic, of upholding the validity of the same considerations which had been deemed inapplicable in the early stages of the proceedings when jurisdictional issues were addressed. In fact, although the two doctrines of foreign sovereign immunity and non-justiciability remain logically distinct, it is hard to envisage how a court could reasonably abstain from passing

¹⁴⁶⁹ Reference can be made also to the US ‘political question doctrine’, imposing self-restraint on courts when required to review congressional or executive acts pertaining to the conduct of foreign affairs (see D. F. Vagts, H. J. Steiner and H. H. Koh, *Transnational Legal Problems* (4th ed., 1994), at 124 *et seq.*). On the inapplicability of the doctrine to human rights violations see *Linder v. Portocarrero*, 963 F. 2d 332 (11th Cir., 1992).

¹⁴⁷⁰ Both reasons were set forth in *Sabbatino*, *supra* note 136, by the US Supreme Court. The idea that the rationale of the act of state doctrine has to be traced to separation of powers concerns was restated by Justice Scalia in *Environmental Tectonics*, *supra* note 137.

¹⁴⁷¹ On the inapplicability of the act of state doctrine to crimes against humanity see alanczuk, *supra* note 63, at 122.

judgment on the conduct of individuals who have committed crimes of international law, after having recognized that international law grants no immunity either *rationae personae* or *ratione materiae* in such cases. To uphold the applicability of the act of state doctrine after denying immunity would amount to reintroducing in the guise of non-justiciability the immunity which had been removed.¹⁴⁷²

This is not to deny that political considerations are relevant, but – as stressed by Lord Nicholls¹⁴⁷³ – they should be considered by the executive when deciding, exercising its discretion within the limits of international obligations and national legislation, whether or not to extradite.

12.6 The Asynchronous Development of International Law and the Quest for Normative Coherence

To attribute the aura of controversy surrounding the proceedings against General Pinochet solely to the highly sensitive aspects of international politics involved in the case would be a rather simplistic exercise. In fact, most of the controversial issues underlying the case are of a legal character. The conflicting arguments submitted by the parties before the House of Lords go well beyond the dynamics of argumentation strategies inherent in the judicial process. They reflect also different conceptions of international law, which eventually have come to clash. Indeed, the Pinochet case may well signal ‘a shift from a State-centred order of things’.¹⁴⁷⁴ The notion of individual accountability for crimes against humanity, the active role of municipal courts in the enforcement of international criminal law as well as the steady process of erosion of the foreign sovereign immunity doctrine are all elements which are hardly amenable within the traditional representation of the international legal system as a horizontally-organized

¹⁴⁷² See *A Limited Bank v. B. Bank and Bank of X, England*, Court of Appeal, judgment of 31 July 1996 (111 ILR 591), quoting Kerr LJ in *MacLaine Watson & Co. v. International Tin Council* [1988] 3 WLR 1169 at 1188.

¹⁴⁷³ *Ex Parte Pinochet (HL 1)*, Lord Nicholls, at 1334.

¹⁴⁷⁴ The expression is used by Fox, *supra* note 12, at 207.

community of sovereign and independent states. The disagreement among the Law Lords involved in the proceedings, however, attests to the fact that the current state of evolution of international law is the object of divergent evaluations. This discrepancy can be partly due to the asynchronous development of different areas of international law. The emergence and relatively rapid consolidation of both human rights and international criminal law has deeply affected, but not decisively altered, the structure and process of international law.¹⁴⁷⁵ The understandable resilience of states to accepting a moving away from a strictly 'State-centred order of things' creates a strain between yet unsystematized notions of international public order and the traditional precepts of international law, largely based on the sovereignty paradigm. The Pinochet case is illustrative of this situation. In strictly positivistic terms it would have been equally difficult to demonstrate conclusively on the basis of state practice either that former heads of states enjoy immunity or that they do not. Between two legally plausible solutions, the House of Lords faced a policy choice in finding for or against immunity. Although one may doubt that this was intended by the Law Lords, the House of Lords' final finding against immunity provided the result which best conforms with the ends and values of the international legal system.

As noted earlier, the notion of individual accountability for crimes against humanity can be fully grasped only in connection with the international human rights doctrine and other recent developments in the structure and process of international law. Particularly relevant, in this respect, is the notion of obligations *erga omnes*, namely obligations which are not owed to any particular state but to the international community.¹⁴⁷⁶ This, in turn, entails that every state has a legal interest in their fulfillment. The pre-eminence of these obligations over others, in light of their content,¹⁴⁷⁷ stipulates a hierarchy of values in the international legal system in which norms concerning the protection of fundamental human rights

¹⁴⁷⁵ See Bianchi, 'Globalization of Human Rights: the Role of Non-state Actors', in G. Teubner (ed.), *Global Law without a State* (1997), at 179 *et seq.*

¹⁴⁷⁶ See *Barcelona Traction Light and Power Co. Ltd.*, ICJ Reports (1970), at 32.

¹⁴⁷⁷ On obligations *erga omnes* see, recently, M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997).

certainly enjoy the highest-ranking status. The persuasive force of the argument is reinforced by the emergence of *jus cogens*, i.e. a set of norms from which no derogation is ever admitted under international law. The importance of certain rules and principles to the international community is such that any unilateral action or international agreement which violates them is absolutely prohibited.¹⁴⁷⁸ Elementary logic supports this conclusion, as the law cannot tolerate acts which run against its very foundation. Despite scholarly disputes as to what norms qualify for the category of *jus cogens*, there is hardly any doubt that genocide, apartheid, torture and, when committed on a large scale or as a matter of state policy, murder, arbitrary detention and enforced disappearance of individuals can be legitimately included in the list.¹⁴⁷⁹

All the above developments converge in purporting the existence of an international public order based on a commonality of core values and interests which are regarded as fundamental by the international community as a whole.¹⁴⁸⁰ Inevitably, the perceived fundamental character attached to these values and interests implies special consequences for their violation. The rapid consolidation of the notion of individual criminal responsibility is coupled by the attempt to introduce similar notions of criminal responsibility at the inter-state level.¹⁴⁸¹ Scholarly disputes and political opposition by some states as to their consequences might prevent the codification of state crimes from being included

¹⁴⁷⁸ See Article 53 of the 1969 Vienna Convention on the Law of Treaties. Generally, on *jus cogens* see L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988).

¹⁴⁷⁹ The list is clearly non-exhaustive and refers mainly to the charges alleged in the *Pinochet* case. For an in-depth analysis of which norms in the field of human rights attain the status of *jus cogens*, see Hannikainen, *supra* note 159, at 425 *et seq.* For an interesting discussion on the relationship between non-derogable rights in human rights treaties and norms of *jus cogens* see Meron, 'On a Hierarchy of International Human Rights', 80 *AJIL* (1986) 1. The *Restatement*, *supra* note 72, lists as *jus cogens* norms genocide, slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention and systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights, when practised, encouraged or condoned as a matter of state policy (§ 702 Comm. N, Reporters' Note 11).

¹⁴⁸⁰ See H. Mosler, *The International Society as a Legal Community* (1980).

¹⁴⁸¹ See Art. 19 of the Draft Articles on State Responsibility, adopted by the International Law Commission on second reading in 1996, distinguishing between international delicts and crimes. The latter may result, *inter alia*, from a serious violation on a widespread scale of an international obligation of essential importance for safeguarding the human being.

in the International Law Commission Draft Articles on State Responsibility, but can hardly hide the widespread acceptance by large sectors of the international community and the world public opinion of the idea that violations of fundamental international obligations must be treated differently from other wrongful acts.¹⁴⁸² This implies not only attaching a sense of opprobrium to the violation but also devising ways and means to punish effectively the wrongdoer, possibly allowing states, other than the injured one, to react individually or collectively to the violation.¹⁴⁸³

This novel structure of international law is slowly making its way into traditional precepts of classical doctrine. However, still many principles, rules and doctrines of both international and domestic law are reminiscent of an old-fashioned and no longer viable approach to international law, which regards respect for the sovereignty of states as the fundamental value of the international system. While state sovereignty remains one of the pillars on which the system hinges,¹⁴⁸⁴ its actual content has undergone a gradual process of erosion. Matters which once indisputably belonged to the domestic jurisdiction of states, such as the way a state treats persons under its jurisdiction, nowadays may be the object of international scrutiny.

The strain between old rules and new principles causes inconsistencies in the international legal system which should be gradually reduced. The achievement of a higher degree of normative coherence is going to be an important challenge for international law in the near future. Coherence of single rules and particular regimes with the fundamental principles and goals of the system is likely to

¹⁴⁸² See the *First Report* of the newly appointed Rapporteur to the International Law Commission on State Responsibility, Professor James Crawford, proposing the deletion of Art. 19 of the Draft Articles and separate treatment of the subject of international crimes (see UN Doc. A/CN.4/490/Add.3, para. 101, 11 May 1998); see also the articles in the Symposium on State Responsibility in this issue.

¹⁴⁸³ See Abi-Saab, 'The Concept of "International Crimes" and its Place in Contemporary International Law', in J. H. H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989) 150.

¹⁴⁸⁴ For an interesting re-assessment of the role of state sovereignty in international law see Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599.

enhance the latter's credibility and legitimacy.¹⁴⁸⁵ As regards the subject at hand, namely individual responsibility for crimes against humanity, normative consistency would require, in the view of this writer, a number of adjustments in international law-making and law enforcement.

First, a comprehensive code of crimes universally accepted as crimes against humanity should be adopted.¹⁴⁸⁶ Existing definitions are strongly influenced by the particular contexts in which they were formulated and it is controversial whether certain particular acts are amenable within the category of crimes against humanity or rather stand in their own way. The proliferation of ad hoc treaties and attempts at codification have not necessarily favoured uniform definitions and standards. The issue is not deprived of practical relevance when one realizes that the characterization of a crime as a crime against humanity is not meant merely to convey a sense of moral reprobation but also to entail a set of specific legal consequences, including the exercise of extraterritorial jurisdiction by any state over such offences. Also the inapplicability of statutes of limitation and the unavailability of the superior orders defence as an exonerating circumstance, should not be controversial elements of the regime.

Perhaps the most astonishing example of the inconsistencies between different areas and doctrines of international law is the one concerning consideration of the foreign sovereign immunity doctrine and its ancillary act of state doctrine as potential bars to judicial enforcement at the level of domestic courts. Reliance on such obsolescent doctrines, which express an unfettered deference to the status of certain subjects, is oblivious of contemporary standards of international law which clearly condemn certain conduct as crimes against the very foundations of

¹⁴⁸⁵ On the role of coherence as a means of legal justification see MacCormick, 'Coherence in Legal Justification', in *Theorie der Normen. Festgabe für Ota Weinberger zum 65. Geburtstag* (1984) 37. On coherence as a fundamental element for determining the legitimacy of international law rules and, consequently, state compliance with them see T. Franck, *The Power of Legitimacy among Nations* (1990); *Idem*, *Fairness in International Law and Institutions* (1995) 38 *et seq.* Accord, R. Dworkin, *Law's Empire* (1986), at 190–192.

¹⁴⁸⁶ See Bassiouni, '“Crimes against Humanity”: The Need for a Specialized Convention', 31 *Columbia J. of Transnat'l L.* (1994) 457. Upon its entry into force, the ICC Statute will be the only binding international law instrument providing a definition of crimes against humanity: see Robinson, 'Defining “Crimes against Humanity” at the Rome Conference', 93 *AJIL* (1999) 43.

the international system. Moreover, their application may hamper the adjustment of legal standards and cultures to the new demands of the international community. There should be no ambiguity on the fact that international law does not and cannot require any deference to states and states' organs, including heads of state, when they commit crimes against humanity or other comparable human rights atrocities. Neither should domestic courts abstain from passing judgment as a matter of comity or on the basis of other judicial self-restraint doctrines when sufficiently clear and judicially manageable standards exist.

Obviously, municipal courts must be given the tools to help enforce international criminal law. Particularly, states should incorporate properly their international law obligations in accordance with their constitutional rules. Attaching reservations to fundamental treaty provisions or denying by statutory provision the self-executing character of entire treaties, rather than leaving it to the courts to determine in each particular case which provisions are self-executing in the light of their content, are policies which may undermine any serious efforts at effectively prosecuting human rights violators.¹⁴⁸⁷

Another noticeable inconsistency concerns the different treatment of crimes of war and crimes against humanity in terms of legal entitlement to prosecution by states. Universal jurisdiction, whose applicability to war crimes is almost uncontested, should also be uncontroversial as regards the prosecution of crimes against humanity. If the rationale of the principle is that of ensuring the punishment of individuals who are regarded as *hostes humani generis* for committing crimes which, by their very nature, affect the interests of all states, elementary logic seems to require that any such crime, be it a war crime or a crime against humanity, should be subject to the same jurisdictional regime.

The latter remark paves the way for addressing another issue of compelling interest in setting the agenda for the future: consistent enforcement. The

¹⁴⁸⁷ See Henkin, 'U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker', 89 *AJIL* (1995) 348, and Stewart, 'U.S. Ratification of the Covenant on Civil and Political Rights: the Significance of the Reservations, Understandings and Declarations', 14 *Human Rights L.J.* (1993) 77 and the text of the reservations, *ibid*, at 123–124.

argument has been made that the attempt to prosecute individuals for international law crimes is going to be a vain effort, as their systematic prosecution is a naive expectation or utopic ambition. Moreover, given the many practical difficulties in apprehending and bringing to justice high-ranking state officials or top political leaders, prosecution will only concern a scant number of individuals with minor responsibilities. First, as the Pinochet case indicates, these allegations are not entirely founded. Secondly, even in domestic legal systems the apprehension and prosecution of offenders is far from systematic. What really matters is to set clear normative standards and to enforce them consistently whenever prosecution is possible under the circumstances. Consistent enforcement requires that no double standard be used in determining jurisdictional and substantive rules, as is a fundamental principle of justice, common to all jurisdictions, that like cases should be treated alike. Over time, the risk of being punished is likely to produce in would-be criminals a deterrent effect which should not be underestimated.

At this point it may be noticed that some states have chosen to deal with their past of human rights atrocities by enacting amnesty laws which have the effect of barring proceedings against the perpetrators of such crimes, thus leaving them unpunished. The underlying policy is meant to restore political and social stability and foster the process of democratization of countries which have either undergone long periods of social and political unrest or endured oppressive or dictatorial regimes.¹⁴⁸⁸ While it may be argued that many treaties impose an obligation to punish certain conduct,¹⁴⁸⁹ it would be difficult to prove that customary international law prohibits the enactment by states of such laws. Surely, however, there is no duty by other states to recognize their effects. Nor

¹⁴⁸⁸ See the interesting decision of the Constitutional Court of South Africa of 25 July 1996, *Azanian Peoples Organization v. President of the Republic of South Africa*, Case CCT 17/96, comment by Wilhelm in 91 *AJIL* (1997) 360, upholding the constitutionality of the Promotion of National Unity and Reconciliation Act of 1991.

¹⁴⁸⁹ See General Comment No. 20 to Art. 7 of the International Covenant on Civil and Political Rights drafted by the Human Rights Committee in 1994, holding amnesty laws 'generally incompatible with the duty of States to investigate such acts, to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.'

would a defence based on them be likely to succeed before an international criminal tribunal or a foreign domestic court.¹⁴⁹⁰

Finally, to ensure the firm rooting of the principle of accountability in the international community, prosecution of crimes against humanity ought to be perceived as legitimate and fair.¹⁴⁹¹ This, in turn, entails the further refinement of the principle of fairness of judicial proceedings. Defendants must be tried by an impartial tribunal, be it national or international, on the basis of clear laws, not having a retroactive effect, and must be in the position to effectively exercise their fundamental rights of defence.¹⁴⁹² In this respect, it is worthy of note that in recent practice, both international and domestic, plenty of evidence can be traced to show that due process requirements have been fully met and the rights of the defendants duly respected. By way of example, one may refer to the decision of the ICTY in the Erdemovic case where, after a long and controversial discussion among the judges, the Appeals Chamber remitted the case to the Trial Chamber to give the opportunity to the defendant to re-plead in full knowledge of the nature of the charges and the consequences of his plea.¹⁴⁹³ As regards the legitimacy of the establishment of the ICTY and the ICTR, both tribunals have addressed allegations that they would not have been established by law and that they would lack the necessary independence. Due consideration was given to the objections raised by the defence, respectively in Tadic' and Kanyabashi, and, eventually, the arguments were rejected on legally founded and persuasive grounds.¹⁴⁹⁴

¹⁴⁹⁰ The best analysis of the above issues is Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale L. J.* (1991) 2537. See also Nino, 'The Duty to Punish Past Abuses of Human Rights Put in Context: the Case of Argentina', 100 *Yale L. J.* (1991), at 2619 *et seq.* and Orentlicher's response, 100 *Yale L. J.* (1991), at 2641.

¹⁴⁹¹ On the fundamental importance of perceptions of legitimacy and fairness for ensuring compliance with international principles and rules see Franck, *The Power of Legitimacy*, *supra* note 166; *Idem*, *Fairness*, *supra* note 166.

¹⁴⁹² The list of factors is somewhat reminiscent of Fuller's requirements for the inner morality of law (see L. L. Fuller, *The Morality of Law* (rev. ed., 1969)).

¹⁴⁹³ *Prosecutor v. Erdemovic* (Sentencing Appeal), Case No. IT-96-22-A, 111 ILR 298 (1998). As regards domestic case law, see the acquittal of John Demjanjuk, indicted for serving as operator of the gas chambers in the Treblinka extermination camp, by the Supreme Court of Israel on the basis of a reasonable doubt concerning the real identity of the defendant: see *Ivan (John) Demjanjuk v. State of Israel*, Cr. A. (Criminal Appeal) 347/88, summarized in English in 24 *Israel Y.B. of Human Rights* (1994) 323.

The fulfillment of the three policy goals expounded above, namely normative coherence, consistent enforcement and judicial fairness, will give further strength to the principle of individual accountability for crimes of international law. More generally, it would contribute to further consolidating the restructuring of the international community on the basis of a commonality of values and interests, respect for which must be secured by all of its members.

12.7 Concluding Remarks

The decision of the House of Lords in the Pinochet case is the first judgment rendered by a municipal court in which a former head of state of a foreign country has been held accountable at law for acts of torture committed while in post. Whether this is going to be a landmark in the history of international criminal law depends on what interpretation will be given to it by scholars and to what extent other courts in different jurisdictions will follow it. While in the first ruling the Law Lords had taken a clear, albeit conflicting, stance on the matter of immunity of a former head of state for acts of torture and other crimes of international law, the narrow focus of the second ruling as well as the convoluted reasoning of some of the Law Lords' individual opinions partly obfuscated the most relevant points of international law. In many respects the decision is a missed opportunity to shed light on issues whose relevance extends well beyond the boundaries of the law of jurisdiction and jurisdictional immunities to reach out to some fundamental aspects concerning the structure and process of contemporary international law. Presumably, scholars too will split over the interpretation and assessment of the likely impact of the case drawing on those parts of the judgment which best fit their beliefs. It would be desirable that they overtly state their premises in doing so. As for this writer, he believes that the very notion of crimes of international law is inconsistent with the application of jurisdictional immunities and domestic

¹⁴⁹⁴ See *supra* note 104; *Prosecutor v. Kanyabashi*, Decision on Jurisdiction Case No. ICTR-96-15-T (18 June 1997); comment by Morris in 92 *AJIL* (1998) 66. In *Kanyabashi*, the Court referred to the *Tadic* decision and held that in determining whether or not the Tribunal had been 'established by law' due account had to be taken of the Tribunal's keeping with the proper international standards providing all the guarantees of fairness and justice. Furthermore, the independence of the judges would guarantee that any accused had a fair trial in the light of the Statute and Rules of Procedure of the Tribunal (*ibid*, at 10).

doctrines of judicial abstention, particularly as regards those crimes which by their very nature either presuppose or require state action. If immunity were granted to state officials or courts refused to adjudicate cases on the merits, prosecution of such crimes would be impossible and the overall effectiveness of international criminal law irremediably undermined. The emergence and subsequent consolidation of the notions of *jus cogens* and obligations *erga omnes* provide a solid conceptual background to justify the exercise of jurisdiction by state over individuals, regardless of their official position, who commit offences which are universally regarded as attacks against the common interests and values of the international community. The majority of the Law Lords acknowledged the non-derogable character of the rules of international law proscribing torture and crimes against humanity, but eventually failed to draw the inevitable conclusion that no immunity can be granted to their violators.

CHAPTER 13

POSSIBLE SOLUTION UNDER THE CONTEMPORARY INTERNATIONAL LAW

Ron Jones stopped for a cigarette outside a bookstore in central Riyadh on March 15, 2001, when a trash can exploded.¹⁴⁹⁵ His wounds and one-night hospital visit, however, were probably the least painful part of the nightmarish chapter of his life that then unfolded. From his hospital bed, Saudi officials seized and imprisoned Jones on suspicion that he planted the bomb.¹⁴⁹⁶ Officials held the fifty-year-old British tax specialist in a Saudi prison for sixty-seven days, during which Jones says he was beaten on his hands, buttocks, and the soles of his feet with a cane and axe handle; deprived of sleep; cuffed and shackled; and threatened with execution.¹⁴⁹⁷

They punched me, kicked me, bounced me off the walls. Then the caning started. They caned the soles of my feet and then they started caning my hands, sometimes with pickaxe handle. They told me they had arrested my wife and son and that they were doing all this to them as well.¹⁴⁹⁸

“The pain of the torture you forget about,” Jones told the *Globe and Mail*, a Canadian newspaper. “The psychological effects of it are a lot more difficult to recover from.”¹⁴⁹⁹

After returning home to England, Jones, a British national, sued Saudi Arabia in British court, seeking damages for assault and battery, trespass to the person,

¹⁴⁹⁵ Alan Freeman, *Saudis Arrested Second Canadian, Colleague Says*, *GLOBE AND MAIL* (Toronto), July 9, 2003, at A12; Paul Kelso, *Saudi Bomb Victim’s Torture Ordeal—and Britain’s Silence*, *Guardian* (London), Jan. 31, 2002, available at <http://www.guardian.co.uk/saudi/story/0,11599,642109,00.html>.

¹⁴⁹⁶ Kelso, *supra* note 1.

¹⁴⁹⁷ Alan Freeman, *Briton Fails in Bid to Sue Saudi Arabia for Alleged Torture*, *GLOBE AND MAIL* (Toronto), July 31, 2003, at A18.

¹⁴⁹⁸ Kelso, *supra* note 1.

¹⁴⁹⁹ *Id.*

false imprisonment, and torture.¹⁵⁰⁰ Jones' case pits the staunch international condemnation of torture against the sovereign immunity that has been a cornerstone of the international legal system for centuries. By filing his case in the United Kingdom, Jones forced the House of Lords to decide whether it would develop an exception to the default rule of civil sovereign immunity for egregious acts that violate settled principles of international law—in this case, the prohibition against torture. In the summer of 2006, the House of Lords decided that the principle of sovereign immunity remained an inviolable tenet of international law subject to no exceptions for grave international crimes, and dismissed Jones' suit against the Kingdom and the police officers who tortured him.¹⁵⁰¹

The House of Lords relied both on Britain's Sovereign Immunity Act and the breadth of international decisions supporting a blanket sovereign immunity from civil suit.¹⁵⁰² Lord Bingham noted that the prohibition against torture is likely a *jus cogens* norm of international law, but said he found no compelling evidence to demonstrate that states allow allegations of torture to overcome the presumption of sovereign immunity.¹⁵⁰³ Instead, the applicable law seemed to confirm that the principle of sovereign immunity remains impenetrable when a state faces civil suit in a foreign court. Lord Bingham extended sovereign immunity to the individual Saudi police officials accused of torture by arguing that these individuals are merely agents of the state, and therefore become folded into the cloak of immunity that protects Saudi Arabia.¹⁵⁰⁴

The House of Lords missed the larger import of the decision and ignored developments in international law that should have shaped their approach to Jones' request. The Jones decision poses a significant setback for international human rights lawyers working to ensure that survivors of torture can seek

¹⁵⁰⁰ Jones v. Saudi Arabia, [2006] UKHL 26 (appeal taken from E.W.C.A.).

¹⁵⁰¹ *Id.*

¹⁵⁰² *Id.*

¹⁵⁰³ *Id.* ¶ 27.

¹⁵⁰⁴ *Id.* ¶ 10.

reparations for the atrocities they endured. Ironically, the United Kingdom's own decision to extradite Augusto Pinochet despite perceptions that this might violate sovereign immunity is one in a series of cases that developed space to bring suit against perpetrators of torture.¹⁵⁰⁵ The United States, the United Kingdom, Italy, and international tribunals have all taken small but significant steps toward ensuring that torture victims have access to their courtrooms.¹⁵⁰⁶

Although a world where all victims have the guarantee of judicial recognition of their claims is far from realized, human rights activists remain increasingly optimistic that foreign courts are ready to litigate torture claims when state courts and international law have failed.¹⁵⁰⁷ Head of state immunity has been significantly derailed as an impenetrable defense in torture claims. In 1997, the United States amended its Foreign Sovereign Immunities Act,¹⁵⁰⁸ under which torture victims can now bring civil suits against governments in federal court.¹⁵⁰⁹ The International Criminal Tribunal for the Former Yugoslavia ("ICTY") emphasized that grave breaches of international criminal law, like torture, can never be official acts for purposes of immunity.¹⁵¹⁰ Sovereigns can no longer rely on immunity when facing criminal charges of horrific human rights abuses. The next logical space would be to pave the way for the civil suits upon which many victims rely for personal restitution. The Jones decision is a drastic blow to that hope.

¹⁵⁰⁵ R v. Bow Street Magistrate and others, ex parte Pinochet Ugarte [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.).

¹⁵⁰⁶ *Id.*; *Siderman De Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1991); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998); Andrea Bianchi, *Ferrini v. Federal Republic of Germany*, 99 AM. J. INT'L L. 242, 244 (2005).

¹⁵⁰⁷ See, e.g., Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 156–57 (2001); Human Rights Watch, *The Pinochet Precedent: How Victims can Pursue Human Rights Criminals Abroad*, <http://www.hrw.org/campaigns/chile98/precedent.htm> (last visited Dec. 18, 2006).

¹⁵⁰⁸ 28 U.S.C. § 1602 (2006).

¹⁵⁰⁹ See, e.g., *Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87 (D.D.C. 2003).

¹⁵¹⁰ *Furundzija*, Case No. IT-95-17/1-T, ¶ 148.

In this paper, I will analyze the international legal context of the concept of state sovereignty to frame a discussion of the Jones decision. The ultimate dismissal of Jones' claims was flawed on several grounds. First, the judges conflated the definition of torture as an "official" state act with the protection of legitimate state behavior afforded by sovereign immunity, ignoring the numerous tribunals that have found torture can never be a legitimate official act for immunity purposes. Second, the Lords relied on an overly technical distinction between civil and criminal immunity to avoid determining when the jus cogens prohibition of torture overcomes sovereign immunity, ignoring the important purpose served by civil reparations in cases of grave human rights abuse. Third, the Lords significantly underestimated the degree of growth and movement in case law, particularly coming out of international criminal tribunals, that has begun to restrict the concept of sovereign immunity. Recent case law indicates that the protection is not as ironclad as Lord Bingham and his colleagues argued.

The second part of this paper will discuss an alternate understanding of state sovereignty more appropriate for an international legal order concerned with human rights and individual security. The importance of human rights today cannot be divorced from the evolution of natural law in centuries past, and exploring the moral and ethical demands of natural law theory will help outline why human rights deserve paramount respect. Natural law helps shape human rights as ethical, not purely legal, demands around which the court must shape positive law. The Jones case demonstrates how absolute notions of sovereign immunity can preempt adherence to these ethical demands. Sovereign immunity should not be viewed as an unbending rule, but instead should be approached with an eye toward the purpose of immunity. Immunity emerged to ensure comity between states; state sovereign immunity is thus rooted in the idea that legal rules should promote international peace and equity.¹⁵¹¹ Sovereignty is a functional, practical idea, and should be adapted to the functions and purposes of the twenty-first century legal order and the shift toward individual rights. Sovereign immunity should apply only to acts that are consistent with our global

¹⁵¹¹ ERNEST K. BANKAS, THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW: PRIVATE SUITS AGAINST SOVEREIGN STATES IN DOMESTIC COURTS 41 (2005).

legal ideals, and should be denied for acts that directly contravene mandates of international law.

13.1 STATE SOVEREIGNTY AND HUMAN RIGHTS

Jones brought squarely in front of the court the tension between longstanding principles of state sovereignty and the newer human rights norms that formed the basis for the petitioners' claims. State sovereignty is the right of a state to independently order its domestic affairs without the intervention of a third-party state.¹⁵¹² Deriving force from the idea that states are equal members of the international legal community,¹⁵¹³ sovereignty was the bedrock principle of the Westphalian system in the seventeenth century. In that system, sovereignty was defined as a state's exclusive internal competence and the external equality of all states.¹⁵¹⁴ A principle contributor to the idea was Thomas Hobbes; his Leviathan—the sovereign state to which all individuals owed their loyalty—became a central part of the concept of sovereignty.¹⁵¹⁵ Hugo Grotius argued that the law of nations generated force from the mutual consent of state sovereigns, who divined the sole power to make laws for their subjects from God.¹⁵¹⁶

The importance of state sovereignty in generating decades of peace and stability cannot be underestimated. One scholar calls sovereignty the “grund norm of international law”¹⁵¹⁷ while another claims that today's international system is

¹⁵¹² *Id.* at 34.

¹⁵¹³ OPPENHEIM'S INTERNATIONAL LAW 339 (Sir Robert Jennings ed., 1992).

¹⁵¹⁴ HAZEL FOX, THE LAW OF STATE IMMUNITY 24 (2002).

¹⁵¹⁵ MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 163 (2003).

¹⁵¹⁶ *Id.* at 166–67. Grotius also put forth a secular notion of natural rights; he felt natural law could not even be changed by God. “Human rights from this secularized perspective would be considered as nonarbitrary, natural, self-evident principles based on the insight of all natural beings.” Alan S. Rosenbaum, *Introduction: The Editor's Perspective*, in THE PHILOSOPHY OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVES 3, 12 (Alan S. Rosenbaum ed., 1980).

¹⁵¹⁷ William J. Aceves, *Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation*, 25 HASTINGS INT'L & COMP. L. REV. 261, 261 (2002).

founded on a “reverence of sovereignty.”¹⁵¹⁸ On the basis of state sovereignty, states promised not to intervene in the business of other states so long as sister states pledged to do the same.¹⁵¹⁹ As Ernest Bankas explains, “But one question that must be grappled with is whether an equal can exercise dominion over another equal. Certainly, no! A sovereign state, given its attributes, has jurisdiction over every individual living under its protection and over all acts that take place within its territorial boundaries.”¹⁵²⁰

Sovereign states were thus immune from suit in the courts of other states. On a practical level, sovereign immunity recognizes that a national Court has no power to enforce a verdict against a foreign state, rendering its judgments null and void.¹⁵²¹ More theoretically, sovereign immunity maintains the independence of states to administer internal policies without outside interference. Sovereign immunity is deemed necessary to maintain comity between states and ensure that each state has the independence to direct its own domestic policies.¹⁵²²

Initially, sovereign immunity was an absolute bar to proceedings against a foreign state.¹⁵²³ When a state asserted immunity before a court, the Court lacked jurisdiction to proceed.¹⁵²⁴ Sovereign immunity rested on the act of state doctrine: a national court may not adjudicate an act of a foreign government within the foreign state’s own territory.¹⁵²⁵ Over time, however, commercial and

¹⁵¹⁸ JACKSON NYAMUYA MAOGOTO, *STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW: VERSAILLES TO ROME 1* (2003).

¹⁵¹⁹ *Id.* at 30.

¹⁵²⁰ BANKAS, *supra* note 17, at 34.

¹⁵²¹ FOX, *supra* note 20, at 29.

¹⁵²² BANKAS, *supra* note 17, at 255; *see also* *Controller and Auditor-General v. Sir Ronald Davison*, [1996] 2 NZLR 278 (C.A.). Harold Koh, in his detailed exploration of transnational litigation in U.S. courts, explained that the three main justifications for sovereign immunity in American courts were comity, separation of powers, and judicial incompetence. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2356 (1991).

¹⁵²³ BANKAS, *supra* note 17, at 21.

¹⁵²⁴ FOX, *supra* note 20, at 18.

trade links penetrated the isolationist walls of state borders, and citizens of one state began to bear the consequences of actions by a second state.¹⁵²⁶ National courts thus began making exceptions in trade disputes by distinguishing between the public powers of the state and the state's role as a private, commercial entity.¹⁵²⁷ As a result, most states now embrace a "restrictive doctrine of immunity" that upholds immunity from suit only according to the former, official category of state behavior.¹⁵²⁸ State behavior is divided into *acta jure imperii*, where immunity is accorded to official and sovereign activities, and *acta jure gestionis*, when states are treated as private entities with no immunity for commercial transactions.¹⁵²⁹

State sovereignty and sovereign immunity fall into the category of customary international law - "the general and consistent practices of states that they follow from a sense of legal obligation"¹⁵³⁰ which, combined with treaties, forms the main source of international law.¹⁵³¹ State practice and statements of international organizations largely reflect the content of customary law.¹⁵³² A principle that is determined to be customary law becomes "binding on all [s]tates, with the exception of persistent objectors."¹⁵³³ Excluding several states (including the United Kingdom) with statutes outlining immunity, states will

¹⁵²⁵ Fiona McKay, *Civil Reparation in National Courts for Victims of Human Rights Abuse*, in JUSTICE FOR CRIMES AGAINST HUMANITY 283, 299 (Mark Lattimer and Philippe Sands eds., 2003).

¹⁵²⁶ BANKAS, *supra* note 17, at 36.

¹⁵²⁷ FOX, *supra* note 20, at 22.

¹⁵²⁸ *Id.* at 2.

¹⁵²⁹ David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L. L. 194, 194 (2005).

¹⁵³⁰ JACK GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 23 (2005).

¹⁵³¹ JANIS, *supra* note 21, at 43.

¹⁵³² *Id.* at 48–51.

¹⁵³³ Human Rights Committee, International Law Association (British Branch), *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, 2 EUR. HUM. RTS. L. REV. 129, 130 (2001).

generally accord other states immunity out of the belief that this is an unwritten but obligatory international rule.¹⁵³⁴

The fundamental basis for the immunity doctrine—that a state alone possesses the power to organize its internal affairs—gives the state the discretion to treat its citizens as it wishes. Herein lies the tension between a world of sovereign states and a world striving for the universal recognition of human rights norms: the existence of human rights norms requires a state to treat its citizens with a basic level of human dignity.¹⁵³⁵ As Louis Henkin explains, “Human rights are universal: they belong to every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development.”¹⁵³⁶ As such, the demands of human rights conventions and law reach inside state borders to dictate how a government must interact with its citizens. Michael Ignatieff aptly calls human rights “a language of moral intervention”¹⁵³⁷ for this very reason.

In the context of the sweeping language of human rights, certain human rights principles are recognized as *jus cogens* peremptory norms of international law. *Jus cogens* norms are fundamental tenets of international law considered accepted by and binding on all states, from which no derogation is permitted.¹⁵³⁸ Customary rules allow objectors to abstain from following the rule; *jus cogens*

¹⁵³⁴ OPPENHEIM’S INTERNATIONAL LAW, *supra* note 19, at 342.

¹⁵³⁵ Alison Brysk, *Introduction: Transnational Threats and Opportunities*, in GLOBALIZATION AND HUMAN RIGHTS 1, 3 (Alison Brysk ed., 2002). Koh argues that “Tokyo and Nuremberg pierced the veil of state sovereignty and dispelled the myth that international law is for states only, re-declaring that individuals are subjects, not just objects, of international law.” Koh, *supra* note 28, at 2358-59. The origins of this ideal, from a moral and ethical perspective, will be explored in section III.

¹⁵³⁶ Louis Henkin, *The Age of Rights*, in INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW, TREATIES, CASES AND ANALYSIS 941, 941 (Francisco Forest Martin et al. eds., 2006).

¹⁵³⁷ MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 19 (2001).

¹⁵³⁸ The Vienna Convention on the Law of Treaties defines a *jus cogens* or peremptory norm of international law as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 31, 1969, 1155 U.N.T.S. 331.

rules require objectors' obedience.¹⁵³⁹ Jus cogens norms restrain state behavior¹⁵⁴⁰ and only the emergence of another norm possessing the same character can modify them.¹⁵⁴¹ War crimes, crimes against humanity, and prohibitions on piracy, genocide, and slavery are all considered jus cogens norms of peremptory international law.¹⁵⁴² However, "there is very little agreement as to which other norms fall within the category of jus cogens norms," or how a norm reaches this level.¹⁵⁴³

Though some debate still exists, jurists and academics generally agree that the prohibition against torture has reached the status of a jus cogens norm.¹⁵⁴⁴ The Ninth Circuit wrote, "[W]e conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of jus cogens."¹⁵⁴⁵ The House of Lords recognized the jus cogens nature of the torture prohibition in Pinochet.¹⁵⁴⁶ The ICTY held that "[b]ecause of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in

¹⁵³⁹ Human Rights Committee, *supra* note 39, at 130.

¹⁵⁴⁰ Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement?*, 22 WIS. INT'L L. J. 245, 265 (2004).

¹⁵⁴¹ Vienna Convention on the Law of Treaties, *supra* note 44, art. 64.

¹⁵⁴² OPPENHEIM'S INTERNATIONAL LAW, *supra* note 19, at 8.

¹⁵⁴³ Stephens, *supra* note 46, at 252.

¹⁵⁴⁴ *Sideman De Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1991). *But see* Stephens, *supra* note 46, at 249. Stephens explains that "[t]here is little agreement about the source of *jus cogens* norms." Much has been written about the utility of the *jus cogens* classification, and the difficulty of determining whether prohibitions like that on torture rise to the level of *jus cogens*. Several notable jurists, including Richard Posner, disagree that the prohibition of torture can never be derogated from: "If torture is the only means of obtaining the information necessary to prevent the detonation of a nuclear bomb in Times Square, torture should be used-and will be used - to obtain the information." Richard Posner, *The Best Offense*, THE NEW REPUBLIC, Sept. 2, 2002, at 30.

Alan Dershowitz similarly posits that in the ticking time bomb scenario, if a terrorist knows the location of a bomb about to go off, the argument for torture is at its strongest, and may even be mandated. Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11*, 81 Tex. L. Rev. 2013, 2024 (2003). Though these are important questions, I am not going to analyze them in this paper and instead will presume the validity of commonly understood *jus cogens* violations.

¹⁵⁴⁵ *Sideman De Blake*, 965 F.2d at 717.

¹⁵⁴⁶ *R v. Bow Street Magistrate and others, ex parte Pinochet Ugarte* [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.).

the international hierarchy than treaty law and even 'ordinary' customary rules."¹⁵⁴⁷

Cases like Jones present the clash of the customary rule of sovereign immunity with the mandate that countries may never deviate from certain international human rights principles. With the birth of human rights as a cognizable movement, "the international community has recognized the existence of other norms that now compete with the sovereignty norm for primacy."¹⁵⁴⁸ As a result, traditional concepts of sovereign immunity are under attack as never before. In the 1999 United Nations ("U.N.") general debate, held almost ten years before Jones, then-Secretary-General Kofi Annan heralded that "[s]tate sovereignty [is] being redefined by the forces of globalization and internal cooperation."¹⁵⁴⁹ Bankas later wrote: "the conceptualization of state equality is losing its irresistible force and the concept of sovereignty is not as compelling as before."¹⁵⁵⁰ Aceves reports that the "sovereignty norm ... sits on a precarious perch."¹⁵⁵¹ For human rights norms to have primacy, a state must be held accountable for their violations, and doing so may require the intervention of a national court:

The argument increasingly being advanced before National Judicial Authorities is that although restrictive immunity is still evolving and has not yet attained the character of customary international law, immunity should be denied in the case of death or personal injury resulting from blatant disrespect for human rights norms which have attained the character or statutes of Jus Cogens ... e.g. the prohibition of torture, crimes against humanity and genocide.¹⁵⁵²

¹⁵⁴⁷ Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 153 (Dec. 10, 1998).

¹⁵⁴⁸ Aceves, *supra* note 23, at 262.

¹⁵⁴⁹ INTERNATIONAL HUMAN RIGHTS IN CONTEXT 584 (Henry J. Steiner & Philip Alston eds., 2000).

¹⁵⁵⁰ BANKAS, *supra* note 17, at 255.

¹⁵⁵¹ Aceves, *supra* note 23, at 262.

¹⁵⁵² BANKAS, *supra* note 17, at 252.

Human rights activists have successfully eroded the corners of immunity for international crimes of the gravest magnitude, such as torture, genocide, or crimes against humanity.¹⁵⁵³

Immunity still remains largely unimpeded for states brought before foreign courts in a civil capacity,¹⁵⁵⁴ and this is where *Jones* arrives. The case pushes at the boundaries of immunity, asking not whether states receive immunity for international criminal claims, but whether immunity may continue to bar civil claims by the victims of those international crimes. Sovereign immunity that prevents a victim from seeking any restitution seems wholly at odds with universal human rights, and the petitioners in *Jones* asked the court to revisit the proper balance between the norms of immunity and human rights.

13.2 THE HOUSE OF LORD'S OPINION IN *Jones v. Saudi Arabia*

A. The Lordship's Holding

In *Jones*, the House of Lords unanimously ruled against revoking sovereign immunity. Lords Bingham and Hoffman wrote separate but similar opinions for the case, with the remaining Lordships concurring in these two judgments.

Lord Bingham's holding rested on several grounds. First, he rejected the petitioner's contention that the international prohibition of crimes like torture is of a higher status, and thus trumps, sovereign immunity.¹⁵⁵⁵ Lord Bingham instead held that sovereign immunity operates as a procedural rule regardless of the substantive claim before the court.¹⁵⁵⁶ Next, he noted that nowhere does the Convention Against Torture provide for universal civil jurisdiction, nor does the U.N. Immunity Convention of 2004 provide exceptions to immunity for civil claims

¹⁵⁵³ Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT'L L.J. 649, 667 (2005).

¹⁵⁵⁴ McKay, *supra* note 31, at 284.

¹⁵⁵⁵ *Jones v. Saudi Arabia*, [2006] UKHL 26, ¶ 27 (appeal taken from E.W.C.A.).

¹⁵⁵⁶ *Id.* ¶ 33.

based on acts of torture.¹⁵⁵⁷ Finally, and most importantly, Lord Bingham said he could identify “no evidence that states have recognized or given effect to international law” requiring universal jurisdiction over claims from breaches of peremptory norms.¹⁵⁵⁸ As a result, he declined to exercise jurisdiction.

Lord Hoffman surveyed the decisions of many national courts before concluding that peer tribunals did not support the assertion of jurisdiction for Jones’ claim.¹⁵⁵⁹ He found that the immunity of the state extended to its agents—in this case, the individual police officials charged with torturing Jones and his co-petitioners.¹⁵⁶⁰ Finally, Lord Hoffman’s opinion argued that the proper place for the petitioners’ claim was an international body or tribunal, rendering inappropriate the exercise of jurisdiction by national courts.¹⁵⁶¹

A major stumbling block in the petitioners’ case, and similar civil claims to come, is the United Kingdom’s 1978 Sovereign Immunity Act, which provides states with immunity from suit in U.K. courts subject to a series of exceptions.¹⁵⁶² The Act further extends the state’s immunity to anything that might affect the property, rights, or interests of the state, as well as any representatives of the state.¹⁵⁶³ Both Lords Bingham and Hoffman found the existence of the Sovereign Immunities Act extremely persuasive in resolving the case. The petitioners conceded, as Lord Bingham noted, that the case did not qualify for any of the exceptions. Instead, the petitioners argued that the court must understand the Act in the context of the European Convention on Human Rights (“ECHR”) Article

¹⁵⁵⁷ *Id.* ¶¶ 25–26.

¹⁵⁵⁸ *Id.* ¶ 27.

¹⁵⁵⁹ *Id.* ¶ 48.

¹⁵⁶⁰ *Id.* ¶ 52.

¹⁵⁶¹ *Id.* ¶ 74.

¹⁵⁶² State Immunity Act of 1979, Ch. 33 (Eng.).

¹⁵⁶³ *Id.*

6,1564 which guarantees parties access to court, and Section 3 of the United Kingdom's Human Rights Act, which mandates that U.K. legislation be read to give full effect to ECHR rights.¹⁵⁶⁵ The petitioners alleged that immunity was contrary to a peremptory norm of international law and therefore inapplicable to the case.¹⁵⁶⁶ Lord Bingham found the Sovereign Immunity Act to be inviolable and further noted that the U.N. Immunity Convention of 2004 similarly provided no exception for civil claims based on torture.¹⁵⁶⁷

B. Flaws in the Lordships' Opinions

Several flaws mark the Lordships' opinions. The opinions ignored recent decisions stating that torture can never be considered an official act for immunity purposes. The House of Lords overplayed the distinction between civil and criminal cases, refusing to import key principles from criminal decisions into the civil claim before them. The Lordships also overlooked recent international case law that allows civil claims for human rights abuses to transcend immunity.

1. Torture is No Longer a Permissible Act of State

The Lordships grounded their decision in the fact that torturous acts are only defined as torture when committed by a public official or an individual acting in an official capacity, rendering torture an act of state.¹⁵⁶⁸ The petitioners argued that

¹⁵⁶⁴ ECHR Article 6 states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Sept. 21, 1970, 213 U.N.T.S. 222.

¹⁵⁶⁵ Human Rights Act of 1998, Ch. 42 (Eng.).

¹⁵⁶⁶ *Jones v. Saudi Arabia*, [2006] UKHL 26, ¶ 17 (appeal taken from E.W.C.A.).

¹⁵⁶⁷ *Id.* ¶¶ 7–10, 26.

¹⁵⁶⁸ The Convention Against Torture defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *opened for signature* Dec. 10, 1984, 108 Stat.382, 1465 U.N.T.S. 85.

torture, as a violation of jus cogens peremptory norms of international law, can never be a permissible official act that generates state immunity.¹⁵⁶⁹ Therefore, petitioners claimed, neither the Sovereign Immunities Act nor the U.N. Sovereign Immunities Convention should apply. The Lordships dismissed this argument with little discussion. Lord Bingham wrote, “It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity.”¹⁵⁷⁰ Because torture is by definition committed by an official, by Bingham’s reasoning, these heinous acts unquestionably rest under the umbrella of sovereign immunity.

This explanation suffers from two fatal shortcomings. One, the Lordships confused the use of “official” for purposes of defining torture with the understanding of official behavior that generates sovereign immunity. Increasingly, courts are defining official behavior for the purposes of immunity as only those acts that are legally sanctioned.¹⁵⁷¹ By this standard, only permissible state action is immune from suit in a foreign court. The Lordships failed to recognize this qualification for state immunity, and in doing so, committed a second significant error: overlooking the array of cases holding that torture may never be an official act for purposes of immunity.

As far back as the Nuremberg trials, international courts have operated under the assumption that certain behavior is not a legitimate act of state. The Charter of the International Military Tribunal for Nuremberg states that the official position of defendants “shall not be considered as freeing them from responsibility or mitigating punishment,” expressly negating any sovereign immunity for individuals engaged in war crimes or crimes against humanity.¹⁵⁷² More

¹⁵⁶⁹ *Jones*, [2006] UKHL 26, ¶ 14.

¹⁵⁷⁰ *Id.* ¶ 19.

¹⁵⁷¹ *Controller and Auditor-General v. Sir Ronald Davison*, [1996] 2 NZLR 278 (C.A.).

¹⁵⁷² Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 82 U.N.T.S. 279.

recently, the charters for the ICTY and the International Criminal Tribunal for Rwanda (“ICTR”) have declared that states may not torture individuals as part of their official policies and acts.¹⁵⁷³ In *Prosecutor v. Furundzija*, the ICTY held that the “official” nature or policy of torture did not immunize torturers from punishment:

What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle.¹⁵⁷⁴

A host of cases under the U.S. Alien Tort Claims Act have similarly invalidated the notion that torture can ever be a permissible official act. In the landmark case of *Filartiga v. Pena-Irala*, for example, the Second Circuit expressed “doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation’s government, could properly be characterized as an act of state.”¹⁵⁷⁵ Numerous other U.S. courts have reaffirmed the Second Circuit’s understanding.¹⁵⁷⁶

¹⁵⁷³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, May 25, 1993, U.N. Doc. S/RES/827; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, Nov. 8, 1994, U.N. Doc. S/RES/955.

¹⁵⁷⁴ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998).

¹⁵⁷⁵ *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980). Koh argued that the Second Circuit’s decision “reaffirmed the Nuremberg ideal: that torture (like genocide) is never a legitimate instrument of state power.” Koh, *supra* note 28, at 2367.

¹⁵⁷⁶ See, e.g., *Hilao v. Estate of Fernando Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Cabiri v. Assassi-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). See also *Letelier v. Chile*, 502 F. Supp. 259 (D.D.C. 1980), discussed *infra* note 107 and accompanying text.

A consensus is emerging: egregious violations of *jus cogens* peremptory norms cannot be official acts of states. The House of Lords itself has already found this to be the case. Noting the “bizarre results” that would ensue if torture were considered a legitimate official act, Lord Browne-Wilkinson queried in *Pinochet*, “How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?”¹⁵⁷⁷ He ultimately found torture to be outside the official acts generating sovereign immunity.

The general rejection of torture as an official act demonstrates two things. One, it reflects the now nearly universal acceptance of the *jus cogens* character of the torture prohibition.¹⁵⁷⁸ Two, and perhaps more importantly, holding that torture is not a legitimate act of state indicates the link between state immunity and an understanding of immunity tailored to its central purpose. Rather than giving blanket immunity to all actions that could arguably trace back to official sources, some courts now implicitly analyze whether an act is permissible act and, in the case of torture, deny immunity to actions that do not further the purpose of immunity: a peaceful, working international legal order.¹⁵⁷⁹

The Lordships took a step back from *Pinochet* and failed to do this in the *Jones* case, ignoring international precedent and coming to a result that undermines present efforts to rein in immunity. In rather circuitous reasoning, the Lordships dismissed the idea that torture could not be an official act purely based on the Torture Convention’s definition of the act.¹⁵⁸⁰ By that logic, then, when could the act of torture, or for that matter genocide, ever generate liability? The definition of torture should not absolve the perpetrators of liability and punishment as the Lordships did in *Jones*. The Lordships confused the use of the word “official” for

¹⁵⁷⁷ *R v. Bow Street Magistrate and others, ex parte Pinochet Ugarte* [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.).

¹⁵⁷⁸ Though many agree that the “compulsory nature of the prohibitions on unlawful killing and torture by the State is clear—these are non-derogable duties,” *jus cogens* “is still in some respects a controversial topic in international law.” Human Rights Committee, *supra* note 39, at 137. *See also supra* note 50 and accompanying text.

¹⁵⁷⁹ *See, e.g., Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 2002 I.C.J. 121 (Feb. 14) [hereinafter *Congo v. Belgium*].

¹⁵⁸⁰ *Jones v. Saudi Arabia*, [2006] UKHL 26, ¶ 19 (appeal taken from E.W.C.A.).

the purposes of defining torture with the act of state doctrine, and failed to look at state immunity through a more purposive lens, inquiring into the nature of the activity and whether that activity serves the general purpose of immunity.

2. The Independent Importance of Civil Liability

The outcome of the Jones case illustrates the widening gap between criminal liability for torturers and civil reparations for their victims. The petitioners relied on the growing body of case law suspending immunity for criminal prosecutions of torturers, but the Lordships dismissed this reasoning as inapplicable to the petitioners' present civil claims.¹⁵⁸¹ For example, a key component of the petitioners' argument was the House of Lords' decision in the Pinochet case in 2000.¹⁵⁸² After Pinochet sought medical treatment in the United Kingdom in 1998, Spain issued an arrest warrant based on the myriad torture allegations leveled against the Senator. The U.K. Commissioner of Police accordingly issued the warrant, which Pinochet promptly moved to quash as contrary to the head of state immunity he enjoyed as Chile's former leader. His challenge ultimately reached the House of Lords.¹⁵⁸³

The House of Lords held that the torture allegations were outside the head of state immunity that Pinochet argued precluded extradition. Lord Brown-Wilkinson focused his inquiry on the narrow question of "whether the alleged organisation of state torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state."¹⁵⁸⁴ He answered no, citing the enormous legal loophole such a holding would create:

¹⁵⁸¹ *Id.*

¹⁵⁸² *Pinochet*, 1 A.C. 147.

¹⁵⁸³ *Id.* The House of Lords heard arguments in the Pinochet case three times. Its first decision was challenged, and consequently set aside, due to one of the Lord's close ties to Amnesty International, which intervened on the plaintiff's behalf.

¹⁵⁸⁴ *Id.*

[A]n essential feature of the international crime of torture is that it must be committed 'by or with the acquiescence of a public official or other person acting in an official capacity.' As a result, all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention.¹⁵⁸⁵

The Pinochet decision created an express exception to head of state immunity for criminal prosecutions of torture. In *Jones*, the petitioners requested that the House of Lords again declare that torture could not be an official act for the purposes of immunity, this time in the context of a civil case.¹⁵⁸⁶ The House of Lords squarely rejected this proposition, citing the difference between criminal and civil proceedings as rendering Pinochet inapplicable.¹⁵⁸⁷ Lord Bingham wrote, "the distinction between criminal proceedings (which were the subject of universal jurisdiction under the Torture Convention) and civil proceedings (which were not) was fundamental to that decision. This is not a distinction we could wish away."¹⁵⁸⁸

And with this, the House of Lords dismissed the Pinochet decision that had been heralded as providing a new chapter in seeking justice for torture survivors.¹⁵⁸⁹ While the distinctions between civil and criminal proceedings should certainly not be ignored, they should not necessarily erase the fundamental message of Pinochet: some acts are not part of the official behavior that immunity is intended to protect. The House of Lords provided little justification for granting such importance to the civil-criminal distinction, and overlooked several reasons that they should extrapolate principles from the Pinochet decision.

¹⁵⁸⁵ *Id.*

¹⁵⁸⁶ *Jones v. Saudi Arabia*, [2006] UKHL 26, ¶ 19 (appeal taken from E.W.C.A.).

¹⁵⁸⁷ *Id.* ¶ 14.

¹⁵⁸⁸ *Id.* ¶ 32.

¹⁵⁸⁹ See, e.g., HUMAN RIGHTS WATCH, *supra* note 13.

That criminal sanctions exist for a particular wrong does not lift the need for accompanying civil liability. The two forms of liability coexist for separate, but complementary, purposes. Criminal liability provides the state-or, in this case, international legal order-with a mechanism to punish those who violate the principles society views as essential to maintaining a safe, cohesive community. The proper unit of analysis is the community, and the accused has breached his or her obligation to the state. Civil liability shifts the inquiry to the individual sufferer of the harm; here, the legal system tries to make a victim whole through the recovery of damages. The violator this time has breached his or her obligation to the individual victim, and civil sanctions concern the victim's well-being.

The two forms of liability work together and reinforce each other frequently. Both criminal and civil remedies “play an important declarative function in society.”¹⁵⁹⁰ Ideally, the holding of a civil or criminal case can even shape emerging international norms.¹⁵⁹¹ It is not unusual for a survivor or victim's family to seek civil damages after the state has prosecuted a criminal case against a defendant. Together, civil and criminal liability provide a holistic solution to a particular harm. When the criminal justice system is unable to provide a remedy for a crime, civil proceedings at least offer hope that the assailant will, quite literally, have to pay for his crime. This is precisely what Jones and his co-petitioners asked for in seeking damages from the Kingdom and the individual assailants.

International law has long recognized the right to an effective remedy for violations of human rights, as the U.N. Commission on Human Rights concluded several years ago.¹⁵⁹² The U.N. Basic Principles and Guidelines on the Right to Remedy and Reparations affirms that “adequate, effective and prompt reparation is intended to promote justice.”¹⁵⁹³ The Principles evince a concern for civil as

¹⁵⁹⁰ Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 154 (2006).

¹⁵⁹¹ Koh, *supra* note 28, at 2398.

¹⁵⁹² McKay, *supra* note 31, at 285.

well as criminal protection. The state, not the victim, controls criminal trials; a civil case channeled by the accuser provides a greater opportunity for empowerment and restoration.¹⁵⁹⁴ Money damages can compensate the victim for emotional distress, lost wages, and bodily harm, and can fund the therapy necessary for healing.¹⁵⁹⁵

That the two forms of liability work closely together indicates that principles guiding criminal liability should not be so easily dismissed when it comes to civil cases. The key tenet of the Pinochet case is that some acts cannot be of the “official” nature necessary for state immunity. There is nothing inherently “criminal” about that principle. As a minority of the European Court of Human Rights recently explained:

the distinction . . . between civil and criminal proceedings, concerning the effect of the rule of the prohibition of torture, is not consonant with the very essence of the operation of a jus cogens rule. It is not the nature of the proceedings which determines the effects that a jus cogens rule has upon another rule of international law, but the character of the rule as a peremptory norm¹⁵⁹⁶

The court provided little explanation as to why the distinction between criminal and civil liability, for the purposes of the Pinochet holding, is so sacrosanct. The Lords’ dismissal of Pinochet as criminal, and therefore entirely inapplicable, seems more likely to stem from a reluctance to deal with the consequences of what might happen when immunity is lifted, as is explored later in this paper.

¹⁵⁹³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ¶ (2)(C), U.N. Doc. 60/147 (Dec. 16, 2005) (emphasis added).

¹⁵⁹⁴ Van Schaack, *supra* note 13, at 156–57.

¹⁵⁹⁵ *Id.*

¹⁵⁹⁶ *Al-Adsani v. the United Kingdom*, [2001] Eur. Cr. H.R. 761, ¶¶ 1, 4 (2001) (Rozakis and Caflisch. J., dissenting).

3. Current Case Law and the Lordships' Decision

Though a universal consensus has by no measure emerged, the strict sovereign immunity that the Lordships envisioned is hardly ironclad. Courts and commentators are recognizing that judges may, and in some cases urging them to, reject immunity in civil cases for acts contrary to international law. The United States has taken a leadership role in this realm, amending the Foreign Sovereign Immunities Act to exempt immunity in cases of torture when the act is committed by an official of a foreign state.¹⁵⁹⁷ This provision, combined with the Alien Tort Claims Act¹⁵⁹⁸ and the Torture Victim Protection Act,¹⁵⁹⁹ has spawned dozens of civil claims for violations of international human rights.¹⁶⁰⁰

As a result, the United States has a breadth of case law focusing on the universal nature of the torture prohibition, a full exploration of which would consume the totality of this paper. In *Letelier v. Republic of Chile*, the D.C. District Court allowed families of assassinated Chilean government leaders to sue the Chilean government in the United States, holding that the suit was not barred. The court held that sovereign immunity was revoked because the act was "contrary to the precepts of humanity as recognized in both national and international law."¹⁶⁰¹ The Ninth Circuit found Argentina to have implicitly waived sovereign immunity by violating international law in torturing its citizens.¹⁶⁰²

¹⁵⁹⁷ Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (1997). The act creates an exception for immunity in cases where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."

¹⁵⁹⁸ 28 U.S.C. § 1350 (2000).

¹⁵⁹⁹ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

¹⁶⁰⁰ Stephens, *supra* note 46, at 245. In *Argentine Republic v. Amerada Hess Shipping Corp.*, the U.S. Supreme Court held that a plaintiff could sue a sovereign, foreign state in U.S. court, although the "sole basis for obtaining jurisdiction" must be the Foreign Sovereign Immunities Act, not the Alien Tort Statute. 488 U.S. 428, 434 (1989).

¹⁶⁰¹ *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980).

¹⁶⁰² *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992).

Overseas, in *Ferrini v. Federal Republic of Germany*, the Italian Court of Cassation awarded damages in a tort action brought by an Italian citizen deported and enslaved during World War II. The court determined that “[t]he argument that no express human rights exception to state immunity exists in international law is flawed because respect for the inalienable rights of human beings has attained the status of a fundamental principle of the international legal order.”¹⁶⁰³ A persuasive minority of the European Court of Human Rights in *Al-Adsani v. United Kingdom* similarly argued that the torture prohibition “overrides any rule which does not have the same status,” and that “the jurisdictional bar is lifted by the very interaction of the international rules involved.”¹⁶⁰⁴

Finally, the ICTY viewed the torture prohibition as “particularly stringent and sweeping,” requiring states to “put in place all those measures that may pre-empt the perpetration of torture.”¹⁶⁰⁵ The tribunal also emphasized that the obligation extends beyond state borders and creates a responsibility to non-citizens as well as to citizens.¹⁶⁰⁶ Even a cursory overview of case law demonstrates that the ICTY, U.S. courts, Italian courts, members of the ECHR, and members of the House of Lords have all rescinded immunity for grave international crimes.

The Lordships, by contrast, relied on the majority’s reasoning in *Al-Adsani*, which was a closely decided case, and the International Court of Justice’s decision in *Congo v. Belgium* to buttress their finding of immunity. In *Al-Adsani*, the European Court held that the United Kingdom was not obligated to waive immunity when a Kuwaiti citizen brought a torture suit against the Kuwaiti government.¹⁶⁰⁷ Rather than holding that immunity could never be revoked for grave human rights abuses, the body only held that there was no firm

¹⁶⁰³ Bianchi, *supra* note 12, at 244.

¹⁶⁰⁴ *Al-Adsani*, 2001-XI Eur. Ct. H.R. 85, 111–13 (Rozakis and Caflisch, J., dissenting).

¹⁶⁰⁵ *Furundzija*, Case No. IT-95-17/1-T, ¶ 148.

¹⁶⁰⁶ *Id.* ¶¶ 151–52.

¹⁶⁰⁷ *Al-Adsani*, 2001-XI Eur. Ct. H.R. at 103.

acceptance that a victim must be entitled to pursue “civil claims for damages for alleged torture committed outside the forum State.”¹⁶⁰⁸ Nowhere, however, did the European Court bar a state from pushing past immunity, as the Lordships suggested.

The ICJ case also merits a second look, particularly since the Lordships rejected the applicability of criminal cases in most other circumstances, but used this criminal case to support its argument. Here, the ICJ invalidated a Belgian Arrest warrant for the Congolese Minister of Foreign Affairs because to arrest him would interfere with the effective functioning of his office.¹⁶⁰⁹ Noting that a foreign minister must frequently travel overseas without inhibition, the ICJ

conclude[d] that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity. . . protect[s] the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.¹⁶¹⁰

The ICJ rested its decision not on the universality of state immunity, but on the benefits to international diplomacy and stability that comes from affording foreign ministers this immunity. The court examined immunity for what it could contribute to the international legal order rather than simply stopping the inquiry once Congo asserted that such immunity existed. These cases do not, when taken in sum, support a blanket protection of sovereign immunity, but demonstrate that it is tailored to and analyzed for individual situations, which the Lordships failed to do.

¹⁶⁰⁸ *Id.*

¹⁶⁰⁹ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 21 (Feb. 14).

¹⁶¹⁰ *Id.* at 22.

C. Possible Implications of the Lordships' Decision

The House of Lords decision in *Jones* contravened applicable case law and international understandings of torture. The holding also expressly undermined a prior decision by the same body that found torture to be an act of state for which immunity could never have been granted. Given this, reasons outside the courtroom likely influenced the Lordships as much, if not more, as the legal briefs submitted.

Allowing *Jones* to proceed for allegations of extraterritorial torture might prompt thousands of similarly situated potential plaintiffs to theoretically flood the U.K. legal system, transforming England into the clearinghouse for civil claims that plaintiffs cannot adjudicate elsewhere. Second, the difficulty of enforcing findings against Saudi Arabia carries significant costs, both logistically and politically.¹⁶¹¹ Enforcement would require great expenditures of British resources to collect money from Saudi Arabia. Third, a key component of the concept of state sovereignty is reciprocity: one state leaves another state alone in exchange for peace in the administration of domestic affairs.¹⁶¹² If the United Kingdom asserted jurisdiction over Saudi Arabian interests, the principle of reciprocity would allow Saudi Arabia to do the same.

On a symbolic level, the House of Lords sent a loud and clear message that the United Kingdom owes no obligation to survivors of torture abroad. The Lords ignored the advice of Amartya Sen: "A foreigner does not need the permission of a repressive government to try and help a person whose liberties are being violated."¹⁶¹³ The Lordships hid behind the concept of sovereign immunity to avoid having to determine what obligations the United Kingdom had to *Jones* and the other survivors of torture.

¹⁶¹¹ FOX, *supra* note 20, at 29.

¹⁶¹² BANKAS, *supra* note 17, at 42.

¹⁶¹³ Amartya Sen, *Human Rights and Asian Values*, THE NEW REPUBLIC, July 14 & 21, 1997, at 33, 39, available at <http://www.mtholyoke.edu/acad/intrel/sen.htm>.

Answering the above question requires deep ethical and moral reflection. Allowing torture survivors to turn to the United Kingdom¹⁶¹⁴ for suits against perpetrators outside British borders implies equal access to justice. Waiving sovereign immunity would demonstrate that survivors of atrocities by Saudi Arabia have just as much a right to restitution as do survivors of atrocities by the United States. The United Kingdom should be compelled to waive immunity and allow suit by the sheer fact that it can; as Peter Singer outlined in his famous 1972 essay on the Bangladesh famine, “if it is in our power to prevent something bad from happening, without sacrificing anything comparable” ourselves, it is our moral obligation to take that action.¹⁶¹⁵ Thus if suing the government of Saudi Arabia helps prevent another brutal session of fingernail pulling, waterboarding, or beating, the United Kingdom has a moral obligation to allow the suit. The second part of this paper, analyzing a revised version of sovereign immunity, attempts to carve out a human rights-centered approach to immunity, allowing survivors access to restitution.

13.3 THE TENSIONS BETWEEN NATURAL AND POSITIVE LAW

The House of Lords’ decision relied almost unilaterally on a discussion of positive international law-to the extent that it exists, a proposition many challenge¹⁶¹⁶-rather than exploring the moral or ethical undertones to the decision they faced. This part will explore the moral foundations of human rights, whether a natural rights approach would challenge the Lordships’ decision-making process, and

¹⁶¹⁴ The United Kingdom had, historically, been seen as a comparative leader in the world of human rights. With the Human Rights Act, European human rights law became enforceable in U.K. courts, sending a symbolic message. Douglass Cassel, *The Globalization of Human Rights: Consciousness, Law, and Reality*, NW. U. J. INT’L HUM. RTS., Spring 2004, at 2, 5.

¹⁶¹⁵ Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972).

¹⁶¹⁶ There is also some debate as to whether international law is properly considered as between two states or between a state and an individual; many think that individual human beings are not the subject of international law. See, e.g., Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 Yale L.J. 2277, 2293 (1991). Skeptics of considering international norms as law point out that there is no world government with police power and enforcement mechanisms, and without a means of enforcement, “norms cannot count as ‘law.’” *Id.* Lea Brilmayer responds that any seeming disjuncture between domestic and international law is misplaced; in domestic law, “[a]ssassination of one’s political opponents is out of bounds, as are torture and suppression of religious freedoms. There is nothing metaphysically suspect about recognizing comparable standards under international law.” *Id.* At 2298.

the moral obligations of countries like the United Kingdom to victims of human rights abuses.

A. Natural Law and the Philosophy of Human Rights

The International Bill of Rights-the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and the International Covenant for Economic, Social and Cultural Rights-prioritizes the dignity of humankind above all else. The preamble of each document holds that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”¹⁶¹⁷ Such bold statements embrace the idea of pre-existing rights for all human beings that, in the view of some scholars, results in an innate inviolability of humankind.¹⁶¹⁸

The legitimacy of human rights (and, by extension, their invocation in legal systems) largely relies on the ethical or moral underpinnings of the human rights system. Different scholars all appear to have their own definitions of human rights, yet a common strand-some notion of unassailable human integrity-runs through them all. Michael Perry would describe human rights as those stemming from the idea that “because every human being has inherent dignity, no one should deny that any human being has, or treat any human being as if she lacks, inherent dignity.”¹⁶¹⁹ Amartya Sen defines human rights as “articulations of ethical demands . . . that . . . will survive open and informed scrutiny.”¹⁶²⁰ Professor Johan D. van der Vyver suggests that human rights are only those “rights and freedoms that are considered particularly fundamental to the

¹⁶¹⁷ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/180 (Dec. 12, 1948) (emphasis added); International Covenant for Civil and Political Rights preamble, Dec. 16, 1966, S. Ex. E, 95-2, 999 U.N.T.S. 171 (emphasis added); International Covenant for Economic, Social and Cultural Rights preamble, Dec. 16, 1966, 993 U.N.T.S. 3 (emphasis added).

¹⁶¹⁸ Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97, 101–03 (2005).

¹⁶¹⁹ *Id.* at 102.

¹⁶²⁰ Amartya Sen, *Elements of a Theory of Human Rights*, 32 Phil. & Pub. Aff. 315, 320 (2004).

existence of the individual as a human being and as a citizen within the social structures of the body politic.”¹⁶²¹ Professor Brian Tierney offers that “natural rights or human rights are rights that inhere in person by reason of their very humanity.”¹⁶²² Martha Nussbaum defines rights as entitlements to capabilities.¹⁶²³ These definitions are only a few of many that continue in this tone.

Yet at their core, all of these definitions are built around the idea that there is something special about being human, conferring upon every human being a certain degree of dignity that can never be surrendered forcibly.¹⁶²⁴ Compiling, sorting, and synthesizing these definitions produces an understanding of human rights as the dignity, impenetrable without the rule of law, a person derives simply by being human. This commonality demonstrates the search for a foundation. The broader human rights movement needs a deeper justification than simply the Universal Declaration or any one of a host of human rights treaties. Though the language and world of human rights as such is often considered a product of the atrocities of the Nazi regime, the idea that humanity’s dignity is sacred is nothing new.

¹⁶²¹ Johan D. van der Vyver, *Morality, Human Rights, and Foundations of the Law*, 54 Emory L.J. 187, 188–89 (2005).

¹⁶²² Brian Tierney, *The Idea of Natural Rights—Origins and Persistence*, 2 NW. U. J. Int’l Hum. Rts. 2, 2 n.2 (2004). Note that Tierney’s definition essentially equates natural rights with human rights, a conflation that many scholars would disagree with; not all human rights are per se natural rights. Tierney explains:

I have used the term [sic] “natural rights” and “human rights” indifferently. “Human rights” is preferred nowadays because this usage dissociates the idea of universal rights from the particular medieval context where the idea of natural rights first emerged. But the two terms have essentially the same meaning.

Id.

¹⁶²³ Martha C. Nussbaum, *Capabilities and Human Rights*, 66 Fordham L. Rev. 273, 275 (1997).

¹⁶²⁴ Some argue that the inherent dignity of humans does not automatically lead to the proposition that fundamental rights attain some “absolute standard of inviolability.” Morgan Cloud, *Human Rights for the Real World*, 54 Emory L.J. 151, 155 (2005). Cloud argues that even the most fundamental human rights, such as the right to life, can be violated if the rule of law is followed, and even the commitment to the rule of law can be derogated from at times, such as in an imminent terrorist attack. *Id.* at 156–57; see also *supra* text accompanying note 50.

Before the world had human rights, the world relied on the force of natural law,¹⁶²⁵ which emerged as far back as the first century B.C.¹⁶²⁶ and expanded into the Roman legal system's *jus naturale*: the basic law common to all humankind, regardless of citizenship, purely by membership in the human race.¹⁶²⁷ Natural law theories reached new heights in the middle ages, when Catholic philosophers, most notably Saint Thomas Aquinas, conceptualized a system of natural law as the result of divine will.¹⁶²⁸ Saint Augustine held that "a law cannot be present where there is no justice"¹⁶²⁹ and "where true justice does not exist, the law also cannot be."¹⁶³⁰ Natural law met new interpretations because social contract theorists believed natural rights-such as those to life, liberty, and property-to be the byproduct of a natural law, the protection of which was the sole mission of government. ¹⁶³¹Many, if not most, of these thinkers relied on the divine will of a higher being as a basis for certain objective truths about humanity.

After a brief decline in popularity in the late nineteenth century,¹⁶³² natural law experienced resurgence in the aftermath of the horrors of the Nazi regime. In this revival, however, the rhetoric of dignity and humanity earned the title of human rights: "It is commonplace to assume that human rights are nearly synonymous with natural rights Indeed, human rights cannot be understood apart from the

¹⁶²⁵ The history of natural law takes up volumes, and this paper does not provide an exhaustive discussion; however, thinking about human rights from the perspective of natural law helps build a foundation for the universality of some human rights when positive law fails.

¹⁶²⁶ LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 1 (1987).

¹⁶²⁷ ROSENBAUM, *supra* note 22, at 11.

¹⁶²⁸ *Id.*

¹⁶²⁹ Van der Vyver, *supra* note 127, at 192, *quoting* Aurelius Augustinus, *DE LIBERO ARBITRIO* 395 (William M. Green ed. Vindobonae (1956)) ("*Nam mihi lex esse non videtur, quae iusta non fuerit.*").

¹⁶³⁰ *Id.* at 192, *quoting* Aurelius Augustinus, *DE CIVITATE DEI: LIBRI XI-XXII* 688 ¶ 1 (Bernardus Dornbart and Alphonsus Kalb eds., Tunholt (1955)) ("*[U]bi ergo iustitia vera non est, nec ius potest esse.*").

¹⁶³¹ ROSENBAUM, *supra* note 22, at 12.

¹⁶³² Rosenbaum attributes its momentary "eclipse" to a variety of factors, including European nationalism and imperialism, attacks on natural law's abstract and formal character, and rejections of the liberal theory of the state. *Id.* at 21.

evolutionary history of [the] concept[]”¹⁶³³ However, the rebirth of the natural rights ideal has, for political and pragmatic reasons, generated one stumbling block for modern day human rights activists. If human rights cannot be divorced from natural law and natural rights, then they necessarily cannot be divorced from the religious thinkers who laid their foundations. The proponents of human rights, however, seek to put forth a universal truth that does not divide across racial, ethnic, or religious lines; this is the modern human rights project. Aligning human rights with natural law prompts the question of whether human rights, too, rest on the divine will. Religious alliances, however, may not be politically savvy; convincing the House of Lords to accept a case because of a religious-based natural right requires a collapse of church and state that putting forth a secular natural right does not. Similarly, when trying to promote human rights across cultural and ethnic boundaries, avoiding a conflict with a state’s dominant religion may be essential.

Consequently, human rights law needs a natural law that does not rely on religion. The intellectual ancestors of human rights, as noted above, may be faith-based. However, the human rights movement can choose the secular parts of natural law just as philosophers have chosen to embrace certain parts of Greek philosophy while rejecting the culture’s reliance on slavery. ¹⁶³⁴ As Robert George, one of today’s leading natural rights theorists, explains, “The natural law is, thus, a ‘higher’ law, albeit a law that is in principle accessible to human reason and not dependent on (though entirely compatible with and, indeed, illuminated by) divine revelation.”¹⁶³⁵ George’s assessment insightfully describes the tension many human rights theorists face: although belief in a higher power is not necessary for a belief in natural law, belief in the divine makes it infinitely easier

¹⁶³³ *Id.* at 4.

¹⁶³⁴ Importantly, many of the strongest defenders of human rights share a cultural and religious tradition. It is certainly no accident that Western and, more recently, Latin American countries have been able to rely on shared religious tradition to voice ethical and moral obligations. The power of liberation theology is a quintessential example of the importance of faith in shaping human rights and development movements. That there is a shared religious background, however, does not mean that the fundamental ideals cannot be packaged *without* a religious basis for countries and policymakers that may not share these same religious beliefs.

¹⁶³⁵ Robert P. George, *Natural Law, The Constitution, and The Theory and Practice of Judicial Review*, 69 Fordham L. Rev. 2269, 2269 (2001).

to provide a logical source for such rights. Michael Perry, for example, denies that natural law can exist apart from a belief in a god and is skeptical of a secular human rights system:

The morality of human rights is, for many secular thinkers, problematic, because it is difficult-perhaps to the point of impossible to align with one of their reigning intellectual convictions, what Bernard Williams called “Nietzsche’s thought”: “There is not only no God, but no metaphysical order of any kind”¹⁶³⁶

Perry’s rather somber conclusion has negative implications for today’s human rights movement, a movement frequently charged with Western imperialism and cultural domination.¹⁶³⁷ Basing human rights on religion could be dangerous for some parts of the world (such as Saudi Arabia, the subject of this paper). The danger to a non-secular natural law is the charge of relativism.¹⁶³⁸ It is certainly true that religious moralities ensure some degree of consensus; a shared mode of thinking can provide a baseline of natural “rights” to which everyone who subscribes to that particular religion can agree.¹⁶³⁹ However, religious baselines can generate as much exclusion as they can build consensus. Regardless of the power of divine will to Robert George and Michael Perry, or St. Thomas Aquinas and St. Augustine before them, today’s globalized world requires an arguably

¹⁶³⁶ Perry, *supra* note 124, at 150, *quoting* Bernard Williams, *Republican and Galilean*, N.Y. REV. BOOKS 45, 48 (1990) (reviewing CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* (1989)). Earlier in the essay he admits, “I doubt that a natural law morality of human rights can stand without theological support.” *Id.* at 133.

¹⁶³⁷ Fernando R. Teson, *International Human Rights and Cultural Relativism*, in *The Philosophy of Human Rights* 379, 390 (Patrick Hayden ed., 2001).

¹⁶³⁸ *Id.* at 380 (“A central tenet of relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.”).

¹⁶³⁹ *But see* Cloud, *supra* note 130, at 160. Cloud points out that many of the seemingly religious ideals of human rights are not wholly rooted in religious doctrine or scripture:

[A] laundry list of allegedly inadequate secular equivalents to religious claims about the sacredness of the human being-‘that all human beings are inestimably precious, that they are ends in themselves, that they are owed unconditional respect, that they possess inalienable rights, and, of course, that they possess inalienable dignity’-are secular ideas that can be as deeply held and as compelling as any religious belief. *Id.*

more objective¹⁶⁴⁰ basis of belief. The human rights movement, for better or for worse, will hardly be able to convince Saudi Arabia of the validity of the right to be free from torture if such a right is linked to a particular religious conception of human integrity.

Human rights lawyers must focus on the purely ethical constructs of human rights, that there is something fundamental about humankind that deserves respect regardless of whether created by a divine will or evolution. There is certainly nothing inherently religious about this claim, particularly when understood in opposition to legal positivism, the idea that there is no necessary link between legal and moral demands.¹⁶⁴¹ The emphasis on necessary is important: legal positivists do not dispute that the law and morality frequently coincide, but they do not require that all laws reflect an underlying moral assumption.¹⁶⁴² The important contribution of positivism is to realize that natural law cannot always stand on its own to generate compliance, and, as such,

¹⁶⁴⁰ There is certainly a danger here, with the use of the word objective, of implying that religious natural rights are not objective. I use the word objective to respond to the criticisms, discussed *infra* text accompanying note 149, that natural law is entirely too subjective.

¹⁶⁴¹ WEINREB, *supra* note 132, at 3. Legal positivism was very much in vogue in the early twentieth century, until the vagaries and atrocities of the Nazi regime exposed the dangers of adhering to morally dubious laws that met a legal positivist's definition of what a law is. In fact, the Nuremberg tribunals, in many ways, revived natural law to explain that there was some law outside the positive legal system that operated to render the Nazi's behavior criminal, even if the law of the state did not:

[T]he law violated in [that] case did not derive from a system of positive law but from the conscience of all civilized men. The conviction that it was impossible to leave these horrible crimes unpunished, although they fell outside a system of positive law, has prevailed over the positivistic conception of the grounding of the law.

Ch. Perelman, *Can the Rights of Man be Founded?* in THE PHILOSOPHY OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVES 45, 47 (Alan S. Rosenbaum ed., 1980). Douglass Cassel also notes that under the positive law, if Germany had only slaughtered German Jews, the legal system would have no recourse: "how a country treated its own citizens within its own borders was generally a matter exclusively within its domestic jurisdiction." Cassel, *supra* note 120, ¶ 35.

¹⁶⁴² Robert P. George, *Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition*, 46 AM. J. JURIS. 249, 251 (2001). However, to assume that legal positivists care little about the moral content of law is not quite accurate; "[l]egal positivists agree that positive law is an appropriate subject of moral inquiry and that a law inconsistent with overriding moral principles does not, simply because it is the law, oblige one to comply." WEINREB, *supra* note 132, at 99.

Even the most ardent proponents of natural law recognized that rooting their moral demands in the rule of law or legal tradition gave the widest appeal possible. According to Tierney, Las Cass "saw the need to defend Indian rights in terms of reason and law that could have the widest appeal. Indeed, his work is especially interesting . . . because he appealed overtly and frequently to the juridical tradition that undergirded the earlier development of natural rights theories." Tierney, *supra* note 128, ¶ 28.

natural law needs to be offered to policymakers as a viable source for positive law systems.

Natural law has certainly met its fair share of challenges in recent years, particularly given recent criticism that the human rights movement is the imposition of Western values on the rest of the world. Critics dispute the objectivity of natural law; despite the allegation that natural law is the accumulation of ethical truths, common criticisms emerge that so-called objective truths are merely the subjective, biased feelings or emotions of their proponents.¹⁶⁴³ In light of such concerns about relativity, Richard Rorty has urged human rights activists to abandon the project he calls “human rights foundationalism.”¹⁶⁴⁴ From this perspective, the goal for human rights theorists should not be to find a fundamental, natural law like basis for their claims but should instead be to improve existing institutions.¹⁶⁴⁵ Trying to reach a single agreement on the source of obligations distracts from the actual fulfillment of those obligations. It seems hard to reconcile the human rights movement with a lack of a foundation-particularly given the tenuous nature (at best) of international law. What motivates the human rights movement but the fundamental belief that there is something about humanity that deserves respect?¹⁶⁴⁶ The human rights movement is, if anything, an effort to codify positive law according to higher ideals; the belief in these ideals is so strong that even after centuries of violations in different forms, individuals continue to seek greater ways to protect a core definition of rights. Understanding human rights as a form of natural law helps one see that human rights norms “form a floor below which international behavior should not fall.”¹⁶⁴⁷

¹⁶⁴³ ROBERT P. George, *In Defense of Natural Law* 2 (1999).

¹⁶⁴⁴ Perry, *supra* note 124, at 145.

¹⁶⁴⁵ Richard Rorty, *Philosophy and Social Hope* xvii (1999). Rorty himself admits that this has opened himself to the charge of moral or cultural relativism.

¹⁶⁴⁶ In responding to Rorty’s claim, Tierney argues, “Surely in all societies people have preferred life to death, freedom to servitude, nutrition to starvation, dignity to humiliation. And human rights claims are one way of addressing these common needs and aspirations of all human beings.” Tierney, *supra* note 128, ¶ 31.

¹⁶⁴⁷ Brilmayer, *supra* note 122, at 2298.

B. Positive Obligations Under Natural Law

Establishing the moral and ethical underpinnings of human rights, and understanding the movement as a modern incarnation of natural rights is helpful from an academic standpoint, but what does this mean for Ron Jones? The philosophical entitlement is only the first part of the inquiry; the more important question, in practical terms, is what understanding human rights through a natural law lens means in the modern courtroom. If there is something inherent about being human that makes human rights worth protecting, it naturally becomes the job of a just and legitimate judicial system to protect them.¹⁶⁴⁸

The case at hand illustrates the danger of relying on a positive law system, divorced from morality, to protect basic natural rights that are incident to being human and not only the product of a formalist legal system.

The deciding factor for the House of Lords was the positivist rule in favor of state sovereignty, which runs into two shortfalls: one, this ignores any ethical obligations under a natural law system, and two, overstates the degree to which state sovereignty is truly a positive law at all.¹⁶⁴⁹ This section will analyze how courts should make decisions when faced with assertions of natural rights, even if the positive law has not yet codified them (or has not codified them to the extent necessary for full enforcement). The House of Lords, when it received Jones' case, should have balanced its ethical obligation-as Amartya Sen points out, human rights are ethical demands above all else¹⁶⁵⁰ against their perception of a positive law. After all, in the words of Robert George, "respect for

¹⁶⁴⁸ A legal positivist might dispute this point, but as discussed *supra* note 147 and in the accompanying text, most positivists tend to believe the law should relate to morality in some fundamental ways.

¹⁶⁴⁹ Lon L. Fuller has identified eight aspects of the rule of law: prospectivity, absence of impediments to compliance by those subject to the law, the promulgation of rules, clarity, coherence with one another, constancy, generality of application, and congruence between official action and declared rule. George, *Reason, Freedom and the Rule of Law*, *supra* note 148, at 250. Though state sovereignty will be examined *infra* section IV(B), natural law and state sovereignty are arguably violations of the requirements for coherence and constancy, given changes in the application of the rule over time.

¹⁶⁵⁰ Sen, *Elements of a Theory of Human Rights*, *supra* note 126, at 320.

the rule of law does not exhaust the moral obligations of rulers or officials . . .
 .”¹⁶⁵¹

In deciding how to handle the Jones case, the separation between Immanuel Kant’s concept of perfect and imperfect obligations is particularly instructive. Take, for example, the case of torture.¹⁶⁵² The obligation, in the face of the importance of freedom from torture for all, of a would-be torturer is obvious: not to torture a particular individual.¹⁶⁵³ However, as Sen explains, the “perfectly specified demand not to torture anyone is supplemented by the more general, and less exactly specified, requirement to consider the ways and means through which torture can be prevented and then to decide what one should, thus, reasonably do.”¹⁶⁵⁴ The House of Lords’ decision falls into the latter category, that of imperfect obligations: the responsibilities of those beyond the would-be torturer.

As a human right-and perhaps one of the most central human rights the obligation not to torture is more than a legal obligation; it is an ethical obligation. That the right to be free from torture is a “significant ethical claim[],” and not a legal claim is “quite irrelevant to the discipline of human rights.”¹⁶⁵⁵ In other words, in the face of a human rights argument, the House of Lords was to make an ethical, not purely legal, decision. Instead, because the ethical command against torture was codified as a legal or semi-legal norm, the Lords forewent the moral inquiry under the guise of the legal discussion. This, in a legal system motivated by natural law, is a failure to meet an ethical obligation.

¹⁶⁵¹ George, *supra* note 148, at 252.

¹⁶⁵² Sen used the torture example in his essay, *Elements of a Theory of Human Rights*, which was helpful for thinking about this section. Sen, *supra* note 126, at 321–22.

¹⁶⁵³ *Id.* at 321.

¹⁶⁵⁴ *Id.* at 322.

¹⁶⁵⁵ *See id.* at 325.

I take as a given that the purpose of a legal system is to provide justice, rather than simply to provide the rules of capitalism or ensure efficient economic transactions.¹⁶⁵⁶ A court must decide how to do so in the face of competing legal obligations (such as, in this case, state sovereignty). For a court, the difficulty of deciding when to intervene arises when one realizes that not all human rights are the proper bases for judicial intervention. Imperfect obligations require the judge to examine the importance of the right at hand, the extent to which he or she can make a difference, and whether others are going to act in the absence of his or her own action.¹⁶⁵⁷ The ethical obligation, above all, is to consider whether one will act by evaluating such factors.¹⁶⁵⁸ The obligation is to make a reasonable choice, which includes considerations of morality and justice.¹⁶⁵⁹ The right to be free from torture is undoubtedly a law well-suited for litigation: the right to bodily integrity is of paramount importance in any hierarchy of human rights, penalizing perpetrators with civil damages not only recognizes the occurrence of a harm but may dissuade similar perpetration in the future when, particularly in the Jones case, other mechanisms have simply failed our victims.

The Jones case is one of many examples of how formalistic adherence to positive law can violate natural law tenets. Natural law, to British courts, is not as foreign as the Jones opinion would make it seem. English common law is close to a positive embodiment of natural law; it is “a body of law which is the fruit of (juristic) reason.”¹⁶⁶⁰ The common law tradition of the state contradicts such

¹⁶⁵⁶ See, e.g., van der Vyver, *supra* note 127, at 199. “The essence of the legal idea is justice, which in one of its many manifestations requires persons in authority to apply political power to protect basic human rights and fundamental freedoms of persons under their domain.” *Id.* The debate over the correlation between a legal system and a system of ethics has a long and contentious history, and the best consensus is articulated by HLA Hart: “There is of course no simple identification to be made between moral and legal rights, but there is an intimate connection between the two, and this itself is one feature which distinguishes a moral right from other fundamental moral concepts.” HLA Hart, *Are There Any Natural Rights?*, 64 *Phil. Rev.* 175, 177 (1955).

¹⁶⁵⁷ Sen, *supra* note 126, at 340. Sen explains this is “an acknowledgement that if one is in a plausible position to do something effective in preventing the violation of such a right, then one does have an obligation to consider doing just that.” *Id.* at 340–41.

¹⁶⁵⁸ *Id.*

¹⁶⁵⁹ George, *supra* note 141, at 2276.

¹⁶⁶⁰ *Id.*

positive law adherence in the face of moral demands. Perhaps it was this very tradition that led to the Pinochet outcome. Regardless, the demands of natural law or human law would have required the House of Lords to exercise jurisdictions despite positive assertions of state sovereignty.¹⁶⁶¹

A court choosing to assert jurisdiction based on some conception of natural rights would likely face criticisms that the court sought to impose Western values worldwide.¹⁶⁶² Values are not neutral, and the post-modern world has certainly highlighted the appeal of moral relativism: that what is good for one part of the world is not necessarily good for another. This conflicts with human rights based on natural rights, which embrace universality. Human rights based on natural rights “embody core values. Among them are the dignity of all human beings, their equality of fundamental worth, and their need to live in community, with respect and empathy for others, but also with some measure of individual liberty. Historically, the West has no monopoly on these values.”¹⁶⁶³ Here, we need to separate the type of human right alleged and recognize that some things today called “human rights” are not necessarily natural rights. For example, the newly ratified U.N. Convention on the Rights of Persons with Disabilities guarantees a right to sport,¹⁶⁶⁴ but this is not, to take the definition explored above, something so fundamental to human integrity that it cannot be taken away. Bodily integrity is an altogether different form of right, and tracing back to natural rights helps separate one right from another. Only those that could be understood as natural, as part of human dignity as it has been understood over time, should receive standing in court when the positive law and natural law collide.

¹⁶⁶¹ In this way, sovereign immunity and natural law are inconsistent, as is explored from a legal perspective *infra* section IV(B).

¹⁶⁶² Some theorists argue that human rights is inherently, necessarily, and permissibly Western. Brian Tierney notes that a presentation of human rights history is “necessarily ... describing a Western construct.” Tierney, *supra* note 128, ¶ 4.

¹⁶⁶³ Cassel, *supra* note 120, ¶ 9.

¹⁶⁶⁴ Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/67, art. 30(5), U.N. Doc. A/RES/61/611 (Jan. 24, 2007) (“States Parties shall take appropriate measures (a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels.”). I do not wish to minimize the importance of this treaty and the promises it provides, but I do hesitate to elevate this protection to the same level as the prohibition on torture.

Interpreting human rights through natural law establishes both the ethical power of the human rights movement and exposes the trouble of following positive law despite persuasive ethical demands. State sovereignty—largely a positive law concept built on practical, outdated concerns, without extensive ethical considerations—should not supersede ethical demands in a just legal system.

13.4 A NEW UNDERSTANDING OF IMMUNITY

For a court to make an ethical, not legal decision, it must be willing to reanalyze legal obligations, such as sovereign immunity, that challenge moral obligations. The decision in *Jones* points to the gap between legal and moral duties that exists for survivors of torture. Victims must either persuade states to conduct lengthy, expensive, and politically contentious prosecutions of alleged torturers, or they must accept that the atrocities they endured will go unrecognized. In civil cases, absolute state immunity for breaches of *jus cogens* norms ensures that perpetrators go unpunished and victims unprotected when criminal sanctions fail. In recognition of this legal black hole, there is a “growing acceptance that international law might permit the courts of one state to hear a civil action regarding serious human rights violations that took place in another.”¹⁶⁶⁵ Torture victims, and similarly situated individuals, should be able to recover civil reparations.¹⁶⁶⁶ This section will analyze how courts should reinterpret the doctrine of sovereign immunity to allow victims of grave human rights abuses to seek reparations in foreign courts.

A. Immunity in a New International Legal Order

The rationale for providing individual reparations aligns with an international order increasingly concerned with protecting individuals. Historically, international law was concerned with mediating between co-equal, independent states.¹⁶⁶⁷

¹⁶⁶⁵ McKay, *supra* note 31, at 287.

¹⁶⁶⁶ For analysis of the importance of reparations for torture victims, see *supra* section II(b)(3).

¹⁶⁶⁷ FOX, *supra* note 20, at 25.

The Westphalian system overlooked what happened within state borders so long as all states reciprocally recognized the sovereignty of others. Although the individual was not entirely lost-Grotius himself argued that the individual is the focal point of all law¹⁶⁶⁸ state primacy remained the best way to achieve the peace necessary to protect the individual.

This description no longer accurately depicts the international legal order. ¹⁶⁶⁹Protecting the individual from abuse at the hands of the state is now central. Documents like the Universal Declaration of Human Rights, the Convention Against Torture, and the International Covenant of Civil and Political Rights demonstrate that the system now prioritize the sanctity of the individual over the sovereignty of the state; the state is no longer able to subject its citizens to whatever treatment it deems fit.¹⁶⁷⁰ As Sen writes, “Since the conception of human rights transcends local legislation and the citizenship of the individual, the support for human rights can come from anyone whether or not she is a citizen of the same country as the individual whose rights are threatened.”¹⁶⁷¹

Sen’s description of human rights points to the degree to which human rights rely on an international, not purely national, system of enforcement. The Westphalian state does not fit a scheme designed to protect individuals regardless of their ethnicity or nationality. Richard Falk explains that “the state is simultaneously too large to satisfy human needs and too small to cope with the requirements of guidance needed by an increasingly interdependent planet.”¹⁶⁷² Falk importantly points out that neither can an individual always access the state for help, nor the state necessarily guarantee aid when needed; an international community can

¹⁶⁶⁸ LYAL SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 149 (1992).

¹⁶⁶⁹ Certainly, borders are not irrelevant. The past century demonstrates that these borders have become less important and more porous, not that they no longer exist.

¹⁶⁷⁰ Jean-Marc Coicaud, *Human Rights in Discourse and Practice: The Quandary of International Justice*, in *THE GLOBALIZATION OF HUMAN RIGHTS* 180 (Jean-Marc Coicaud et al. eds., 2003).

¹⁶⁷¹ Sen, *supra* note 119.

¹⁶⁷² Richard Falk, *The End of the World Order: Essays on Normative International Relations*, in *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW, TREATIES, CASES AND ANALYSIS* 936, 938 (Francisco Forest Martin et al. eds., 2006).

address the problems that fall through the fingers of the state. Citizenship is no longer the core requirement for the enjoyment of particular rights.¹⁶⁷³

Globalization has only compounded the shift in attention from the state to the individual, and the international legal order has had to readjust to accommodate the rapid flow of immigration and emigration. Genocide, political instability, and economic upheaval have created a tide of migration across the planet.¹⁶⁷⁴ The mass movement of people increases the degree to which foreign states are responsible for the human rights and well-being of strangers. Today, the specter of terrorism means that countries like the United Kingdom may bear the results of ignoring deplorable conditions of neighboring countries; the effects of human rights abuses will not be internalized to the abusing state.

In the case of grave human rights abuses, then, a unilateral focus on state prosecution of state criminality shifts attention away from the individual that human rights law has elevated over the past fifty years. Allowing for civil reparations helps restore focus on, and humanity to, the individual who raised the allegations in the first place. As Beth Van Shaack explains: "Civil suits provide a mechanism by which individual victims can initiate and control the legal process. They contribute toward the rehabilitation of victims, the deterrence of future abuses, and the enunciation of norms in ways that other forms of redress may not."¹⁶⁷⁵ The individualized focus of a civil suit-individualized counsel, reparations, opportunities to rebuild-is entirely consistent with an international legal order that increasingly recognizes the importance of the individual.¹⁶⁷⁶

¹⁶⁷³ Scholars like T. Alexander Aleinikoff argue that separating between citizen and alien is no longer appropriate, and that this distinction is "too binary." Sanford Levinson, Book Review, *Shards of Citizenship, Shards of Sovereignty: On the Continued Usefulness of an Old Vocabulary: Semblances of Sovereignty: The Constitution, the State, and American Citizenship*, 21 CONST. COMMENTARY 601, 605 (2004).

¹⁶⁷⁴ Gil Loescher, *Refugees: A Global Human Rights and Security Crisis*, in HUMAN RIGHTS IN GLOBAL POLITICS 229, 233 (Tim Dunne & Nicholas Wheeler eds., 1999).

¹⁶⁷⁵ Van Shaack, *supra* note 13, at 155.

¹⁶⁷⁶ Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 271 (1982).

Universal jurisdiction for civil suits for individual human rights abuses ensures restitution or rehabilitation when other mechanisms fall short. The courts of the territory where the abuse occurred are often unwilling or unable to adjudicate claims stemming from violations of international law. Courts outside this territory may similarly be unwilling or unable to take on the burden of criminal prosecution. And despite the proliferation of human rights treaties and institutions, individuals have recourse to few, if any, international or regional institutions in times of abuse.¹⁶⁷⁷ In many cases, citizens cannot count on their domestic courts or on international institutions to remedy rights infringements, and in those situations, other states' courts can fill a much-needed gap in international adjudication.¹⁶⁷⁸ An international system changes the traditional boundaries of the common good,¹⁶⁷⁹ which an individual's state can no longer wholly secure.¹⁶⁸⁰ As John Finnis explains, If it now appears that the good of individuals can only be fully secured and realized in the context of international community, we must conclude that the claim of the national state to be a complete community is unwarranted and the postulate of the national legal order, that it is supreme and comprehensive and an exclusive source of legal obligation, is increasingly what lawyers call a "legal fiction."

In recognition of this legal fiction and the broader community responsible for common good, all courts, regardless of their location, will thus have an important role to play in cases needing individualized restitution.

B. Sovereign Immunity and Human Rights Considerations

¹⁶⁷⁷ *Id.*

¹⁶⁷⁸ Douglass Cassel argues that domestic courts can play a support role, providing "jurisprudential guidance" to other courts. Cassel, *supra* note 120, at 65. Right now, he says, "we cannot count on effective national implementation," necessitating some degree of intervention by the international community. *Id.* at 62.

¹⁶⁷⁹ John Finnis defines the common good as "the set of conditions which enables the members of the community to attain for themselves reasonable objectives, or to realize reasonable for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively or negatively) in a community." John Finnis, *Natural Law and Natural Rights* 155 (1980) (*quoted in* Robert P. George, *In Defense of Natural Law* 235 (1999)).

¹⁶⁸⁰ George, *supra* note 185, at 235. George asserts that natural law theory, in today's world order, necessitates the development of a world government.

Despite the increasing recognition that civil reparations have a crucial role in addressing torture and similar abuses, principles of sovereign immunity frequently preempt claims, as was the case in *Jones*. The Lordships' vision of state sovereignty no longer resonates with a global order focused on human rights. A shift away from understanding immunity as an absolute, unyielding rule of law would allow petitioners to succeed. Restrictive forms of immunity are not as uncommon as the Lordships seemed to think they are, and are entirely justifiable under norms of international law.

1. Traditional Immunity was not Absolute

The notion of sovereign immunity as an absolute, natural right is inconsistent with the historical understanding of immunity. Rosalyn Higgins argues that this vision of immunity is backwards: "It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity."¹⁶⁸¹ The presumption is generally in favor of jurisdiction.¹⁶⁸² Historically, courts approached assertions of immunity by examining the purpose of the act in question, and would only accept immunity if the act had a pure state purpose.¹⁶⁸³ Though jurists have largely invalidated this test in recent years by examining the nature, rather than purpose of the act, it demonstrates the initial flexibility of immunity.¹⁶⁸⁴

One of the most cited early codifications of sovereign immunity came from the U.S. Supreme Court in 1812. Under the orders of Napoleon, French officials seized a ship belonging to two Maryland citizens as the vessel sailed to Spain.¹⁶⁸⁵ When the ship returned to an American port, the citizens attempted to

¹⁶⁸¹ *Id.*

¹⁶⁸² Donovan & Roberts, *supra* note 96, at 142.

¹⁶⁸³ *Id.* at 167.

¹⁶⁸⁴ *Id.*

¹⁶⁸⁵ *The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812).

reclaim it, but the district Court presumed that it lacked jurisdiction.¹⁶⁸⁶ Writing for the majority, Justice Marshall found that the ship was a national vessel commissioned by the state of France, and as such, enjoyed exemption from U.S. jurisdiction by virtue of sovereign immunity.¹⁶⁸⁷

Justice Marshall grounded his analysis in the purpose of sovereign immunity, and implied that the outcome would have been different France had used the ship for commercial purposes: “Nor can the foreign sovereign have any motive for wishing such an exemption. His subjects ... are not employed by him, nor are they engaged in national pursuits.”¹⁶⁸⁸ However, when, for example, foreign ministers arrive in the United States on a diplomatic mission, the nature of the work justifies sovereign immunity:

A sovereign committing the interests of his nation with a foreign power ... cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.¹⁶⁸⁹

Even in the early nineteenth century, it was not possible to fully justify absolute immunity.

In fact, the emergence of a modern state embroiled in commercial transactions, as well as political and diplomatic affairs, captivated English judges decades before Jones. Lord Tom Denning, one of the most celebrated figures in English law, said in a 1958 speech in *Rahimtoola v. The Nizam of Hyderabad* that, “sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute Is it

¹⁶⁸⁶ *Id.*

¹⁶⁸⁷ *Id.*

¹⁶⁸⁸ *Id.* at 144.

¹⁶⁸⁹ *Id.* at 139.

properly cognizable by our courts or not?”¹⁶⁹⁰ Lord Denning rooted his comments in case law as early as 1820 that denied immunity to claims of sovereigns regarding ship accidents. For the Lordships of the nineteenth century, presence within the United Kingdom was enough for the court’s jurisdiction over commercial state acts.¹⁶⁹¹ Courts in the late nineteenth and twentieth centuries misread the early case law and failed to draw a distinction based on the nature of an activity, as Lord Denning urged.¹⁶⁹² Even in the United Kingdom, “[h]istorically then, the absolute view is devoid of authority. The immunity of the sovereign was in fact a limited one.”¹⁶⁹³

The ease with which states adopted the restrictive conception of immunity demonstrates that sovereign immunity is not a fundamental, inalterable right.¹⁶⁹⁴ The restriction of immunity when trade and commercial activities crossed state boundaries implies that immunity can, and should, be modified for an ever-changing international order. This forces the question: “if contracts, why not torture?”¹⁶⁹⁵ Just as “the adoption of this restrictive attitude to state immunity has been encouraged by the vast expansion of activities of the modern state in the economic sphere,” recognition of human rights has “tended to render unworkable” an absolute rule.¹⁶⁹⁶ The emergence of human rights norms and a globalized world are changes that may necessitate recognition of a new balance between law and sovereignty.¹⁶⁹⁷

¹⁶⁹⁰ Lakshman Marasinghe, *The Modern Law of State Immunity*, 54 MOD. L. REV. 664, 667 (1991).

¹⁶⁹¹ *Id.*

¹⁶⁹² *Id.* at 670.

¹⁶⁹³ *Id.* at 674.

¹⁶⁹⁴ Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741, 754 (2003).

¹⁶⁹⁵ Koh, *supra* note 28, at 2365. He continues: “If a court could hold a foreign sovereign defendant in violation of a commercial contract without usurping the executive function, why couldn’t it hold the same defendant in violation of a human rights treaty, or a clearly defined *jus cogens* norm against torture?” *Id.* at 2365–66. This is the basis for the Second Circuit’s decision in *Filartiga*, discussed *supra* in text surrounding note 81, where the court compared the torturer to the commercial pirate or slave trader as an “enemy of all mankind.” *Id.*

¹⁶⁹⁶ OPPENHEIM’S INTERNATIONAL LAW, *supra* note 19, at 357.

2. Immunity Based on the Nature of the Act

The existing restrictions on sovereign immunity are based on a classification of the act as either official or commercial in nature. A human rights centered sovereignty would add a third classification for acts contrary to jus cogens norms of international law. Under this system, only official acts that are both non-commercial and legal under the international order would receive immunity. This alteration incorporates the increasing recognition that torture is never a permissible state act. One commentator, urging for a similar reorganization of sovereignty, calls for a “theory of collective benefit,” claiming that “international law requires state immunity only as to state activity that collectively benefits the community of nations.”¹⁶⁹⁸ This model more accurately takes into account the original purpose of sovereign immunity: to facilitate comity amongst states.¹⁶⁹⁹

Such a reconceptualization of immunity is consistent with existing law. The International Court of Justice’s decision in *Congo v. Belgium* found the main rationale for upholding the foreign minister’s immunity not to be blanket state sovereign immunity, but the function of the minister’s work in the international order.¹⁷⁰⁰ The court focused on the nature of his position, rather than the purpose of the particular act producing the arrest warrant. Both approaches produce the same result: immunity should be justified by the role it serves in the international order. Using somewhat differing reasoning, the Wellington Court of Appeal also found that refusing sovereign immunity was justified when the impugned activity breaches a fundamental principle of justice.¹⁷⁰¹ The basis for the Wellington Court’s finding was less from the nature of the act and more from the inviolability of certain legal principles, but the message was the same: certain behavior cannot be considered official acts of state subject to immunity.

¹⁶⁹⁷ JANIS, *supra* note 21, at 160.

¹⁶⁹⁸ Caplan, *supra* note 200, at 744.

¹⁶⁹⁹ *Id.* at 755.

¹⁷⁰⁰ *Id.*

¹⁷⁰¹ *Controller and Auditor-General v. Sir Ronald Davison*, [1996] 2 NZLR 278 (C.A.).

Others have argued that torture claims should trump assertions of sovereign immunity under the normative hierarchy theory. This approach identifies the competing norms at issue in this case, human rights and state immunity and determines whether “the fundamental character of [one]... is such as to place [it] on a higher rank with the consequence that they prevail over ‘ordinary’ international law.”¹⁷⁰² Both the prohibition of torture and the promise of state immunity are customary rules of international law; however, because torture is a *jus cogens* obligation and immunity is not, immunity must fall to the torture prohibition when the two conflict.¹⁷⁰³

Normative hierarchy theory is a useful but incomplete way to approach situations when two fundamental international norms conflict. The theory rests on formalist distinctions between different sorts of international laws, between *jus cogens* and mere customary rules, between unbending obligations and those that do not bind states. This is important theoretically but limited practically; as many academics have noted, discerning the exact status of an international legal rule is far from simple: “oftentimes state practice is so diverse that it may be difficult or even impossible to find enough consistency of practice to warrant drawing a customary international legal rule from it.”¹⁷⁰⁴ Normative hierarchy theory may actually generate as much confusion as it aims to solve when claims of immunity are brought.

In another approach to sovereign immunity, Harold Koh argues that courts should approach civil claims for human rights abuses on a case by case basis, adjusting the controlling doctrines of “federal jurisdiction, civil procedure, and foreign sovereignty law to target separation of powers, judicial competence, and comity concerns as they arise.”¹⁷⁰⁵ Though his “doctrinal targeting approach” is

¹⁷⁰² Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes, and other Rules the- Identification of Fundamental Norms*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER* 25 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

¹⁷⁰³ See FOX, *supra* note 20, at 517; see also Caplan, *supra* note 200, at 741–42.

¹⁷⁰⁴ JANIS, *supra* note 21, at 53.

¹⁷⁰⁵ Koh, *supra* note 28, at 2382–83.

tailored for U.S. courts (clearly federalism doctrine is not an issue in U.K. courts, nor are separation of powers concerns of the same magnitude for the House of Lords as for the American judiciary), his case-by-case approach mandates considered application of sovereignty to see if its invocation is actually serving its purpose.¹⁷⁰⁶ Koh would have a court ask whether the plaintiff is a member of the particular class protected by a treaty, the nature of a claim (and the degree to which it is too political for a court), and the identity of the defendant to determine whether comity, separation of powers, or judicial competency concerns arise. This analysis urges the same considerations described above to determine whether the commitment to sovereign immunity justified in a particular case. In cases of egregious human rights violations, Koh would argue that it is not.

Somewhat similar to Koh's approach, courts should evaluate each claim of sovereign immunity with an eye toward reconciling state immunity with its purpose. This is what led many states to abandon immunity for purely private or commercial functions of the state. Adjudicating claims related to trade did not challenge the peace and equality among states that sovereign immunity emerged to protect.¹⁷⁰⁷ If torture can no longer be an official act under current law, then it must be a private act for immunity purposes as well. Adjudicating claims for breaches of jus cogens norms of international law safeguards and reinforces the justification for immunity, by forcing states into compliance with the international legal order. Accountability facilitates the international comity that gave birth to sovereign immunity in the first place.

States should and do care about ensuring that fellow countries follow the dominant rules of the international legal order, particularly in the case of jus cogens peremptory norms. Violations of jus cogens norms, such as waging an aggressive and unprompted war on a peer state, can directly threaten foreign states. More indirectly, these violations create refugee populations who are victims of torture and crimes against humanity, many of whom ultimately land on

¹⁷⁰⁶ *Id.*

¹⁷⁰⁷ OPPENHEIM'S INTERNATIONAL LAW, *supra* note 19, at 357.

the streets of the United Kingdom, stretching the resources of host states. The aftermath of genocide, war crimes, and grave human rights abuses creates humanitarian emergencies that other states must coordinate and fund. Globalization enables criminal and terrorist activities to cross borders with ease.¹⁷⁰⁸ In these ways, migration has changed how we think about human rights.¹⁷⁰⁹

In this self-interested but very real way, states like the United Kingdom have a concrete and particularized interest in preventing internationally devastating situations.¹⁷¹⁰ Civil liability is just one of many tools available that may stem the tide of grave human rights abuses, and it may have only a limited effect on torture. Nevertheless, when states do commit these crimes, they strain the ties of the international community, threatening the peace and stability that the international system is supposed to provide. This threat induced the Italian Court of Cassation to hold that “international crimes undermine the very foundations of international existence,” and give other states the right to take measures to prevent them.¹⁷¹¹ Civil suits could encourage states to consider international treaties when setting the standards of behavior to which their officials must adhere, influencing the evolution of new norms.¹⁷¹² Moreover, even if civil suits fail to deter violence, they offer a degree of restoration that is unavailable elsewhere.

¹⁷⁰⁸ Alex Y. Seita, *Globalization and the Convergence of Values*, 30 Cornell Int’l L.J. 429, 431 (1997).

¹⁷⁰⁹ Jack Donnelly, *Human Rights, Globalizing Flows, and State Power*, in *GLOBALIZATION AND HUMAN RIGHTS* 230 (Alison Brysk ed., 2002).

¹⁷¹⁰ Seita argues that countries like the United Kingdom, which have enjoyed many of the fruits of globalization by virtue of their position as industrialized democracies, have a special obligation to ensure that the benefits of globalization accrue to other countries. “The industrialized democracies have an essential, indispensable role in determining the policies and programs for globalization that will promote common values, balance competing values, solidify respect for the rule of law, and increase empathy among nations. This role is given . . . by a simple fact of economics. . . .” Seita, *supra* note 214, at 471.

¹⁷¹¹ Bianchi, *supra* note 12, at 244.

¹⁷¹² Koh, *supra* note 28, at 2398.

Punishment in foreign courts can be a disincentive for torture.¹⁷¹³ This is not to say that allowing civil claims in foreign courts will prevent or solve all instances of human rights abuse. To the contrary, it will make a limited dent on human rights abuses. However, the significance for the individual victim is substantial, even if imposing liability offers little deterrence. Adopting a particularized interest in how foreign states treat their citizens by penetrating immunity is consistent with facilitating comity among states. An absolute version of immunity is unnecessary; immunity can be tailored to recognize jus cogens norms without compromising—in fact, while augmenting—good foreign relations. A rule like this would demonstrate that immunity does “not apply to state conduct, e.g., the violation of the human rights of another state’s citizens, which undermines the aim and purpose of the international legal order.”¹⁷¹⁴

3. Criticisms

Challenges will arise if jurisdiction widens, but these should be dealt with not by closing the door to jurisdiction, but by developing strict criteria.¹⁷¹⁵ In fact, many of these criticisms are no different for criminal cases, and courts have already considered them.¹⁷¹⁶ The first and most obvious criticism of a human rights-centered immunity, or the “theory of collective benefit,” is the difficulty in distinguishing what violations sufficiently challenge the “collective benefit” to necessitate jurisdiction. All human rights violations are potentially detrimental to the collective benefit and threaten the interests of a foreign state. This could create a situation where, for example, the execution of juveniles in the United States prompts civil suits abroad.

¹⁷¹³ Importantly, Douglass Cassel notes that part of what is important about evolving human rights norms is their uncertainty and unpredictability. Cassel, *supra* note 120, ¶ 91. He explains:

The risk to governments is further compounded by the constantly changing rules of the game. Standards are constantly ratcheted up, and ingenious new traps and penalties devised. The only certainty may be that whatever the costs to a government of human rights violations today, they may be higher tomorrow. Human rights enforcement is not so much a moving target as a moving marksman.

Id. ¶ 93.

¹⁷¹⁴ Caplan, *supra* note 200, at 771.

¹⁷¹⁵ Donovan & Roberts, *supra* note 96, at 157

¹⁷¹⁶ Van Shaack, *supra* note 13, at 197.

This is where the distinction between jus cogens and non-peremptory norms of international law will prove useful. The importance of a jus cogens norm is that it is binding on all states regardless of explicit consent,¹⁷¹⁷ and all states can therefore be accountable for their violations. Limiting the exception to jus cogens violations ensures that courts exercise jurisdiction over foreign states only in cases of the most egregious violations, stymieing the value-laden and culturally sensitive discussions that can accompany issues like religious freedom or gender equality. Without the jus cogens modification, a human rights exception to sovereign immunity could potentially include infinite claims for breaches to environmental and economic norms.¹⁷¹⁸

A related concern is the fear that universal civil jurisdiction will have no limitations and that all states will find themselves subject to liability in another state.¹⁷¹⁹ Limiting the immunity exception to jus cogens norms helps ameliorate this concern. Experience with universal criminal prosecutions also helps here; the few convictions of grave human rights abusers demonstrate that these are norms that “are not at risk of over enforcement.... [T]he grant of jurisdiction has not been fully utilized for its purpose of ending impunity for serious violations of international law.”¹⁷²⁰

Some feel that the existence of civil remedies is unnecessary in an age when states or heads of states can be criminally liable. This, however, misses the independent importance of civil adjudication, as discussed in section II(b)(ii). Civil jurisdiction allows victims to control the litigation and directly confront the perpetrator; victims can turn to civil claims when the state is unwilling or unable to prosecute. Damages compensate the victim, while criminal claims focus on

¹⁷¹⁷ JANIS, *supra* note 21, at 65.

¹⁷¹⁸ FOX, *supra* note 20, at 528.

¹⁷¹⁹ Donovan & Roberts, *supra* note 96, at 156.

¹⁷²⁰ *Id.*

punishing the perpetrator. Criminal trials do not obviate the need for civil claims. “It would be paradoxical if a victim of a human rights violation could exercise universal jurisdiction in a criminal context, but not obtain civil redress under the same basis of jurisdiction.”¹⁷²¹

A revised form of immunity will hardly undermine international comity. Many of the criticisms reflect the concern that international law does not belong in domestic court because it is different; international law is less law than diplomacy and politics, and judicial intervention would threaten the diplomatic channels upon which international harmony relies.¹⁷²² However, this is no different from the many other instances in which the judicial branch has the power to question the actions of the executive or the legislative branch. Some scholars further question the importance of immunity, arguing that appearing before a foreign court does not impair equality, independence, or dignity.¹⁷²³ The consequences of a civil ruling are less threatening from a comity perspective; the remedy will only be money, and will result in less exceptional measures against a government.¹⁷²⁴ In his concurrence to *Sosa v. Alvarez-Machain*, Justice Breyer emphasized that universal jurisdiction for civil claims is “consistent with principles of international comity.”¹⁷²⁵ He argued that “allowing every nation’s courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect.”¹⁷²⁶

¹⁷²¹ Van Shaack, *supra* note 13, at 196.

¹⁷²² Brilmayer, *supra* note 122, at 2279.

¹⁷²³ OPPENHEIM’S INTERNATIONAL LAW, *supra* note 19, at 342.

¹⁷²⁴ Van Shaack, *supra* note 13, at 196.

¹⁷²⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).

¹⁷²⁶ *Id.*

13.5 CONCLUSION

Ron Jones suffers from post-traumatic stress disorder.¹⁷²⁷ There is still a week in the midst of the sixty-seven days of torture that he cannot recall because he was given a sedative that buried the memories.¹⁷²⁸ Recovering damages in British court would not have brought back these missing days, and may not have fully funded the therapy needed to overcome PTSD. A judgment against Saudi Arabia, however, could have given Jones and the other survivors the global recognition that they had been wronged in a way the international community has said nobody should ever be harmed.

The Lordships' decision prioritized the customary rule of sovereign immunity over the *jus cogens* prohibition on torture. The reasoning was flawed in misunderstanding the definition of torture, in its emphasis on the division between civil and criminal proceedings, and in the dismissal of many persuasive cases from other jurisdictions. The real flaw in the Lordships' decision, however, is the ethical message that the decisions send: survivors of torture and other crimes, no matter how egregious, can find no restitution in the United Kingdom. In an era when the Universal Declaration of Human Rights promises that "all human beings are born free and equal in dignity and rights,"¹⁷²⁹ the House of Lords prioritized the sanctity of the state.

The inability of survivors like Jones to find civil restitution demonstrates the need to revisit our understanding of state immunity in light of the overwhelming growth of the human rights field and its ethical demands. Principles of human rights determined to be inviolable, like the prohibition on torture or crimes against humanity, are no longer legitimate acts of the state in the eyes of numerous courts, and the shield of sovereign immunity cannot apply to them. If our international legal system gives some tenets the label of *jus cogens*, states must

¹⁷²⁷ Kelso, *supra* note 1.

¹⁷²⁸ *Id.*

¹⁷²⁹ Universal Declaration of Human Rights, *supra* note 123.

be willing and able to support that assertion by punishing those who violate these norms. And if criminal punishment is unattainable, civil liability provides a measure of deterrence, recognition, and restitution.

Without this, perpetrators may go forever unpunished and victims forever wounded. For Ron Jones, the lack of recognition by the U.K. Court system was just another shock for him to bear. “They had won,” he said of his torturers after his release.¹⁷³⁰ And with the Lordships’ recent decision brushing aside ethical obligations, the perpetrators of this abuse did, quite truly, win.

¹⁷³⁰ Kelso, *supra* note 1.

CHAPTER 14

CONCLUSIONS: PROPOSED REFORMS

14.1 Introduction

The recent judgment of the International Court of Justice in the Case Concerning the Arrest Warrant of 11 April 2000 (the Congo v. Belgium), delivered on 14 February 2002, confirms the tendency of the Court to be seized and deal with topical issues confronting the international community. States, particularly developing countries, increasingly turn to the Court for the settlement of disputes that touch upon sensitive questions arising in their international dealings.

In this case the Congo claimed that Belgium, by issuing an arrest warrant against the then Congolese foreign minister for grave breaches of the Geneva Conventions of 1949 and for crimes against humanity allegedly perpetrated before he took office, breached international law. In particular, according to the Congo, Belgium violated the 'principle that a state may not exercise its authority on the territory of another state', the principle of sovereign equality of member states of the United Nations, as well as the diplomatic immunity of the Minister for Foreign Affairs of a sovereign state. Belgium contended, instead, that there had been no breach of international law, as the foreign minister concerned enjoyed immunity from prosecution while on official visits to Belgium; he was only liable for criminal prosecution during visits in a private capacity to Belgium.

Clearly, the question underlying this dispute belongs in the range of crucial issues facing the current international community: the tension between the need to safeguard major prerogatives of sovereign states and the demands of emerging universal values which may undermine those prerogatives. On the one hand, states cling to the notion that, when it comes to the exercise of criminal jurisdiction, it is up to the territorial or national state to prosecute and punish criminal offences. On the other hand, faced with the failure of territorial or national states to punish odious international crimes, there is a tendency to shift from territoriality or nationality: states other than the territorial or national state

claim the right to exercise extraterritorial criminal jurisdiction over those crimes. Similarly, international criminal tribunals or courts are set up, precisely to substitute for states unable or unwilling to prosecute and try alleged authors of international crimes.

The Court has handed down a judgment that is remarkable for its brevity: it is both concise and stringent. The Court has pronounced only upon the scope of immunities accruing to foreign ministers and ruled that Belgium violated international law, as those immunities cover all acts performed abroad by incumbent foreign ministers, designed as they are to ensure the effective performance of their functions on behalf of their respective states. According to the Court, a foreign minister enjoys immunities from foreign criminal jurisdiction and inviolability, whether the minister is on foreign territory on an official mission or in a private capacity, whether the acts are performed prior to assuming office or while in office, and whether the acts are performed in an official or private capacity. The Court has, however, excluded that the granting of such immunities could imply impunity in respect of any crime that a foreign minister may have committed. In an important passage of the judgment, amounting to an obiter dictum, the Court has envisaged four exceptions in this regard,¹⁷³¹ none of which was present in the case at issue.

14.2 The Court's Spelling Out of the Law on the Personal Immunities Accruing to Foreign Ministers

The judgment under discussion makes an important contribution to a clarification of the law of (what one ought to correctly term) personal immunities (including inviolability) of foreign ministers. This is an area where state practice and case law are lacking. To make its legal findings, the Court, therefore, did not have to establish the possible content of customary law. Rather, it logically inferred from the rationale behind the rules on personal immunities of senior state officials, such as heads of states or government or diplomatic agents, that such immunities must perforce prevent any prejudice to the 'effective performance' of

¹⁷³¹ See the Judgment, at para. 61; see *infra*.

their functions. They therefore bar any possible interference with the official activity of foreign ministers. It follows that an incumbent foreign minister is immune from jurisdiction, even when he is on a private visit or acts in a private capacity while holding office. Clearly, not only the arrest and prosecution of such a minister while on a private visit abroad, but also the mere issuance of an arrest warrant, may seriously hamper or jeopardize the conduct of international affairs of the state for which that person acts as a foreign minister.

By and large, this conclusion is convincing, despite the powerful objections raised by Judge Al-Khasawneh in his important Dissenting Opinion.¹⁷³² The Court must be commended for elucidating and spelling out an obscure issue of existing law. In so doing it has considerably expanded the protection afforded by international law to foreign ministers. It has thus given priority to the need for foreign relations to be conducted unimpaired.

In contrast, one ought to express misgivings on two issues. First, the Court's failure to rule, prior to tackling the question of immunity from jurisdiction, on whether states are authorized by international law to exercise extraterritorial criminal jurisdiction. Second, the Court's failure to distinguish between immunities inuring to state officials with respect to acts they perform in their official capacity (so-called functional or *ratione materiae* immunities) and immunities from which some categories of state officials benefit not only for their private life but also, more generally, for any act and transaction while in office (so-called personal immunities). This second flaw involves, as we shall see, legal consequences that prove extremely questionable.

14.3 The Court's Failure to Pronounce on Belgium's Assertion of Absolute Universal Jurisdiction

It would have been logical for the Court to first address the question of whether Belgium could legitimately invoke universal jurisdiction and then, in case of an affirmative answer to this question, decide upon the question of whether the

¹⁷³² See Dissenting Opinion, paras 1–2.

Congolese foreign minister was entitled to immunity from prosecution and punishment. That the Court should have proceeded in this manner has been cogently argued by a number of Judges in their Separate Opinions (President Guillaume, Judges Ranjeva, Higgins, Kooijmans, Buergenthal, Rezek)¹⁷³³ as well as by Judge ad hoc van den Wyngaert in her Dissenting Opinion. It is therefore not necessary to dwell on the matter. Suffice it to point out that the Court has thus missed a golden opportunity to cast light on a difficult and topical legal issue.

Fortunately, some Judges deemed it necessary to discuss the point in their Separate Opinions; they have thus made a significant contribution to elucidating existing law. For instance, some of these Separate Opinions clarify terminology. President Guillaume distinguishes between universal jurisdiction (*competence universelle*) denoting jurisdiction over extraterritorial crimes by foreigners, based on the presence of the accused in the forum state, and universal jurisdiction by default (*competence universelle par défaut*), that is, jurisdiction asserted by a state without any link with the crime or the defendant, not even his presence on the territory, when that jurisdiction is first exercised (by initiating investigations, issuing an arrest warrant, etc.).¹⁷³⁴ Judges Higgins, Kooijmans and Buergenthal distinguish instead between ‘universal jurisdiction properly so called’, that is jurisdiction over crimes committed abroad by foreigners against foreigners, without the accused being in the territory of the forum state, and ‘territorial jurisdiction over persons for extraterritorial events’, that is jurisdiction over persons present in the forum state who have allegedly committed crimes abroad.¹⁷³⁵ Perhaps, in order to emphasize the ‘meta-national’ dimension of the jurisdiction, one should speak of ‘absolute universal jurisdiction’ (that is, jurisdiction over offences committed abroad by foreigners, the exercise of which is not made subordinate to the presence of the suspect or accused on the

¹⁷³³ See President Guillaume’s Separate Opinion, paras 1–17; Judge Ranjeva’s Opinion, paras 1–12; Judges Higgins, Kooijmans, Buergenthal’s Joint Separate Opinion, paras 2–18; Judge Rezek’s Opinion, paras 3–11; Ad hoc Judge van den Wyngaert, paras 4 and 7.

¹⁷³⁴ See paras 5, 9.

¹⁷³⁵ See paras 31–52.

territory), and ‘conditional universal jurisdiction’ (which is instead contingent upon the presence of the suspect in the forum state).

As to the question of whether either category of jurisdiction is authorized by international law, President Guillaume answers in the negative, holding the view that international law only authorizes, at customary level, universal jurisdiction by default for piracy, whereas treaties may, and indeed do, oblige contracting parties to exercise universal jurisdiction proper.¹⁷³⁶ Judge Rezek takes a similar view.¹⁷³⁷

In contrast, Judges Higgins, Kooijmans and Buergenthal maintain that international customary law, in addition to authorizing ‘universal jurisdiction properly so called’ over piracy, does not prohibit such jurisdiction for other offences, subject to a set of conditions they carefully set out.¹⁷³⁸ The enunciation of these conditions whether or not one can fully subscribe to all of them¹⁷³⁹ indubitably constitutes a commendable contribution to the careful delineation of general legal principles on the question of universal jurisdiction. It seems correct to hold the view that universal jurisdiction properly so called (or,

¹⁷³⁶ See paras 5–9, 12–13.

¹⁷³⁷ See para. 6.

¹⁷³⁸ These conditions are as follows: (i) the state intending to prosecute a person must first ‘offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned’; (ii) the charges may only be laid by a prosecutor or investigating judge who is fully independent of the government; (iii) the prosecution must be initiated at the request of the persons concerned, for instance at the behest of the victims or their relatives; (iv) criminal jurisdiction is exercised over offences that are regarded by the international community as the most heinous crimes; (v) jurisdiction is not exercised as long as the prospective accused is a foreign minister (head of state, or diplomatic agent) in office; after he leaves office, it may be exercised over ‘private acts’ (see paras 59–60 and 79–85).

¹⁷³⁹ Some of the conditions may however give rise to objection. For instance, one fails to see why, in the first of the five conditions set out by the three judges, it is required that ‘the national state of the prospective accused’ be ‘offered’ the opportunity to act upon the charges. Why should one leave aside the territorial state (normally the *forum conveniens*) or the state of which the victim is a national? In addition, why should one envisage that the state exercising universal jurisdiction should ‘offer’ to another state the chance to prosecute the suspect? To make such an offer would involve shifting the whole matter from the judiciary to foreign ministries and might imply making a bilateral agreement. It would be easier to require that the Court intending to exercise jurisdiction should first establish whether courts of the territorial or national state have (deliberately) failed to prosecute the suspect at issue; only then should a court proceed to assert universal jurisdiction.

It is submitted that also the fifth condition should be couched differently, to take account of the existence of the customary rule referred to in the text above, and which is intended to remove functional immunity in the case of international crimes.

according to the terminology I would prefer, absolute universal jurisdiction) is permitted by general international law, subject to the conditions set out by these three distinguished Judges regardless of whether or not, as a matter of legal policy, the upholding of absolute universal jurisdiction is considered inadvisable in current international relations¹⁷⁴⁰ or even likely to lead to the eventual substitution of 'the tyranny of judges for that of governments'.¹⁷⁴¹

An issue on which most judges seem to agree and is perhaps in need of some clarification is the view that under customary law piracy constitutes the only case where states are undoubtedly authorized to exercise 'universal jurisdiction properly so called' (or absolute universal jurisdiction). With respect, it may be contended that in fact the exercise of 'universal jurisdiction' by states over pirates belongs to the category of 'territorial jurisdiction over persons for extraterritorial events' (or conditional universal jurisdiction); in other words, it is predicated on the presence of the accused on the territory of the forum state. States may try pirates only after apprehending them, hence only when the pirates are on their territory or at any rate under their physical control: this is a typical application of the well-known maxim *ubi te invenero, ibi te judicabo*. One of the reasons most likely motivating this legal regulation is that, at a time when piracy was rife and all states of the world were therefore eager to capture persons engaging in this crime, potentially innumerable 'positive conflicts of jurisdiction' were settled in this way. Indeed, if all states had been entitled to claim jurisdiction over pirates wherever they were, very many positive conflicts would have ensued. Instead, granting jurisdiction to the state apprehending the pirates neatly resolved the matter. Furthermore, had the universal jurisdiction over pirates been absolute (or 'universal properly so called'), any state of the world could have issued arrest warrants against pirates. State practice, however, does not show any such trend,

¹⁷⁴⁰ I, for one, have expressed doubts about the expediency of upholding 'absolute universality' rather than 'conditional universality', at least with regard to persons having the status of senior state officials, in my paper 'Y a-t-il un conflit insurmontable entre souveraineté des Etats et justice pénale internationale?', in A. Cassese and M. Delmas-Marty (eds), *Crimes internationaux et juridictions internationales* (2002), at 22–28.

¹⁷⁴¹ See Kissinger, 'The Pitfalls of Universal Jurisdiction', 80 *Foreign Affairs* (2001), at 86 (and see 86–92).

and this, together with national legislation¹⁷⁴² and the restatement in the 1932 Harvard Law School Draft Convention and Comment¹⁷⁴³ bears out the 'conditional' nature of such category of universal jurisdiction. True, under customary law, restated in Article 105 of the 1982 Convention on the Law of the Sea, 'on the high seas, or in any other place outside the jurisdiction of any State', every state may seize a pirate ship (or aircraft) and arrest the pirates. It would seem, however, that this action does not constitute an exercise of jurisdiction in the sense used by the various Judges in their Opinions, that is, judicial jurisdiction. It only constitutes an exceptionally authorized use of enforcement powers over private ships not belonging to the capturing state (executive jurisdiction). Jurisdiction, in the sense of exercise of judicial power by courts, will follow. It is the state that has the alleged pirates in its hands that will exercise jurisdiction: as Article 105 provides, 'The courts of the State which carried out the seizure may decide upon the penalties to be imposed.'¹⁷⁴⁴

Probably, the twofold significance of the word 'jurisdiction' accounts for the questionable language one can find in some of the Separate Opinions. It is well known that 'jurisdiction' means, depending on the context, either effective authority or control by a state, or state officials, over persons or territory (executive jurisdiction), or exercise of judicial authority by courts of law (judicial jurisdiction). The two notions ought to be distinguished. It would seem that when speaking of piracy and stating that jurisdiction over pirates is 'universal' or

¹⁷⁴² See, e.g., Section 290 of the US Criminal Code of 4 March 1909 (35 Stat. 1088) ('Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life' (in 26 *AJIL* (1932) *Suppl.*, at 899), Article 20(5) of the 1890 Penal Code of Colombia ('National or foreigners who commit acts of piracy and are apprehended by the Colombian authorities' 'shall be punished according to this Code' (*ibid*, at 955), Article 2(2) of the 1916 Penal Code of Panama (*ibid*, at 997–998), Article 4(9) of the Penal Code of Venezuela, of 1926 (*ibid*, at 1013). However, most national laws do not specify whether the pirate must be in the custody of the prosecuting state, although the laws of Greece (*ibid*, at 973–974) and Brazil (*ibid*, at 908) seem to envisage a very broad jurisdiction, regardless of the presence of the pirate on the territory.

¹⁷⁴³ Under Article 14(1) of the Harvard Law School Draft Convention, 'A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.' (26 *AJIL* (1932), *Suppl.*, at 745). In the Comment on Article 14 the views of such writers as Halleck, Pradier-Fodere, Bluntschli, as well as the *Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law* are quoted in support of the Article (*ibid*, at 852–854).

¹⁷⁴⁴ In the Comment on the 'Draft Convention, with Comment' prepared in 1935 by the 'Research in International Law of the Harvard Law School', it is stated that in the case of the crime of piracy 'the competence to prosecute and punish may be founded simply upon a lawful custody of the person charged with the offence' (29 *AJIL* (1935), Supplement, at 564; see also 565).

'universal properly so called' the Judges in question referred wrongly to the second meaning.

14.4 Is Absolute Universal Jurisdiction Admissible?

Let us return to a major legal issue, namely the view set out by the three Judges referred to above, that absolute universal jurisdiction is legally admissible under international law. It seems appropriate to make a few points, which are all intended to bear out and fortify this view.

First, one should not be misled by the fact that in the case at issue and in other similarly striking cases, the person accused held a high position in government. Universal jurisdiction may also be, and indeed is, envisaged for cases involving lower-rank officers or state agents, or even civilians, culpable of alleged crimes such as torture, war crimes, crimes against humanity, and so on. With regard to such persons, one is at a loss to understand why, if the national or territorial state fails to take proceedings, another state should not be entitled to prosecute and try them in the interest of the whole international community. As far as these persons are concerned, the initiation of criminal proceedings in their absence, the gathering of evidence and the issuance of an arrest warrant would have the advantage of making their subsequent arrest and trial possible. Normally these persons are not well known, and their travels abroad do not make news, unlike those of foreign ministers or heads of state. Hence the only way of bringing them to trial is to issue arrest warrants so that they are at some stage apprehended and handed over to the competent state.

Secondly, it is commonly admitted that under traditional international law states are allowed to act upon the so-called protective principle, that is, for the safeguard of national interests, and can thus prosecute foreigners who commit crimes abroad (for instance, counterfeiting of national currency). In other words, states are authorized to take proceedings with regard to extraterritorial acts whose link with the forum state exclusively lies in the infringement by these acts of a national interest of that state. If this is so, it would seem warranted to hold

that in the present world community, where universal values have emerged that are shared by all states and non-state entities, states should be similarly authorized to act upon such values. To put it differently, it would seem that any state is currently authorized to try foreigners who perpetrate abroad criminal offences which have no personal or territorial link with that state, but which attack and seriously infringe upon those universal values; in so doing, the state acts not to protect a national interest but with a view to safeguarding values of importance for the entire world community.

Thirdly, it is a fact that United States courts have for many years asserted universal jurisdiction by default, admittedly in civil proceedings, over serious violations of international law perpetrated by foreigners abroad.¹⁷⁴⁵ Although civil jurisdiction is less intrusive than criminal jurisdiction, when it is exercised over foreigners who possess official status (for instance, high-ranking state officials), it nevertheless amounts to interference with the internal organization of foreign states. Whether or not this trend of US courts is objectionable as a matter of policy, or on legal grounds, it is a fact that it has not been challenged, or in other words has been acquiesced in, by other states.

This implicit acceptance through non-contestation would seem to evidence the generally shared legal conviction that, in case of serious and blatant breaches of universal values, national courts are authorized to take action, subject to fulfillment of some fundamental requirements, such as ensurance of a fair trial.

Fourthly, for the purpose of confirming that customary international law or general principles of international law do indeed authorize - subject to the conditions set out by the Judges at issue, or to similar conditions¹⁷⁴⁶ the exercise of absolute universal jurisdiction, one ought to also take into account some significant elements of state practice. I will briefly recall some of these elements.

¹⁷⁴⁵ See, e.g., Damrosch, 'Enforcing International Law through Non-Forcible Measures', 269 *HR* (1997), at 161-167.

¹⁷⁴⁶ See my remarks in *supra* note 9.

Article 23(4) of the Spanish law of 1985 as amended in 1999¹⁷⁴⁷ provided for absolute universal jurisdiction even in advance of the Belgian law. Furthermore, the relevant Spanish case law is worthy of mention (in addition to a judgment of the Constitutional Court,¹⁷⁴⁸ the decisions of the Audiencia Nacional in Pinochet,¹⁷⁴⁹ Scilingo¹⁷⁵⁰ and Fidel Castro¹⁷⁵¹ should be recalled). In

¹⁷⁴⁷ Under Article 23 para. 4 that Spanish jurisdiction also extends to 'facts committed by Spaniards or foreigners abroad and liable to be considered, under Spanish law, as one of the following crimes: (a) Genocide; (b) Terrorism(g) any other crime that, pursuant to international treaties or conventions, must be prosecuted in Spain'.

¹⁷⁴⁸ See the judgment of 10 February 1997 (no. 1997/56). The ship of the accused (flying Panama's flag) had been chased and seized on the high seas for drug trafficking; the accused had been prosecuted before Spanish courts for one of the crimes over which the Law of 1985 granted universal jurisdiction to those courts. In its lengthy decision, the Constitutional Court took the opportunity to state in an *obiter dictum* that Article 23 para. 4 of the 1985 Law, granting universal jurisdiction, was in keeping with the Constitution: the Spanish legislator had 'conferred a universal scope (*un alcance universal*) on the Spanish jurisdiction over those crimes, corresponding to their gravity and to the need for international protection' (Legal Ground 3 A). Spanish text on CD Rom on Spanish Legislation and case law, EL DERECHO, 2002, Constitutional decisions.

¹⁷⁴⁹ See, in particular, the Order (*auto*) of 5 November 1998 (no. 1998/22605). In this order the Spanish National High Court (*Audiencia nacional*) confirmed that national courts have jurisdiction over genocide and terrorism committed in Chile (see Legal Grounds nos 3 and 4; as for torture, where the Court held that Spanish jurisdiction was based on Article 23(4)(g), on the strength of the 1984 Torture Convention, see Legal Ground no. 7). It should be noted that the Court concluded that 'Spain has jurisdiction to judge the acts (*conocer de los hechos*), based on the principle of universal prosecution of certain crimes... enshrined in our domestic law. It also has a legitimate interest (*interes legítimo*) in exercising that jurisdiction as more than fifty Spaniards were killed or made to disappear in Chile, victims of the repression reported in the orders' (Legal Ground no. 9). In other words, as is apparent both from the words reported and the entire text of the decision, Spanish jurisdiction was not grounded on passive nationality; the presence of Spaniards among the victims of the alleged crimes only amounted to a 'legitimate interest' of Spain in the exercise of universal jurisdiction. This order was confirmed by the decision of the *Audiencia Nacional* of 24 September 1999 (no. 1999/28720). There, the Court reiterated that the Spanish Court had jurisdiction over the crimes attributed to Pinochet, namely genocide, terrorism and torture (Legal Grounds 1 and 10–12), and also stated that Pinochet could not invoke the immunities pertaining to heads of states, for he no longer held this status (Legal Ground no. 3). For the (Spanish) text of the order and the subsequent decision, see the Spanish case law on CD Rom, EL DERECHO, 2002, Criminal jurisprudence, as well as on line: www.derechos.org/nizkor/espana.

¹⁷⁵⁰ See the Order (*auto*) of 4 November 1998 (no. 1998/22604), very similar in its tenor to that of 5 November referred to in *supra* note 17.

¹⁷⁵¹ See Order (*auto*) of 4 March 1999 (no. 1999/2723). The *Audiencia Nacional* held that the Spanish Court could not exercise its criminal jurisdiction, as provided for in Article 23 of the Law on the Judicial Power, for the crimes attributed to Fidel Castro. He was an incumbent head of state, and therefore the provisions of Article 23 could not be applied to him because they were not applicable to heads of states, ambassadors etc. in office, who thus enjoyed immunity from prosecution on the strength of international rules to which Article 21(2) of the same Law referred (this provision envisages an exception to the exercise of Spanish jurisdiction in the case of 'immunity from jurisdiction or execution provided for in rules of public international law'). See Legal Grounds nos. 1–4. The Court also stated that its legal finding was not inconsistent with its ruling in *Pinochet*, because Pinochet was a former head of state, and hence no longer

particular, Fidel Castro bears underlining. This case was material to the matter submitted to the Court, for it dealt with charges laid against an incumbent head of state. The Spanish court ruled that, as long as he was in office, Fidel Castro could not be prosecuted in Spain, not even for international crimes envisaged under the Spanish law of 1985. In addition, it is worth considering a recent German case, *Sokolovic*, where the Bundesgerichtshof ruled that when the jurisdiction of German courts is provided for in an international treaty, those courts are entitled to try genocide and other international crimes even absent any link between the crime, or the offender, or the victim, and Germany.¹⁷⁵² Also worthy of note is that in the course of the drafting process of the Statute of the International Criminal Court, Germany forcefully expressed the view that international customary law at present authorizes universal jurisdiction over major international crimes.¹⁷⁵³ In line with this view, Article 1 of the bill on

enjoyed immunity from jurisdiction (see Legal Ground no. 5). For the (Spanish) text of the order, see the CD Rom, EL DERECHO, 2002, Criminal case law.

¹⁷⁵² The German Criminal Code contains a provision (Section 6 para. 1), whereby ‘Regardless of the law of the place of commission, the German criminal law is also applicable to the following acts committed outside of Germany: para. 1. Genocide’ (whereas Section 6 para. 9 refers to ‘Acts committed abroad which are made punishable by the terms of an international treaty binding in the Federal Republic of Germany’). While in the past courts tended to interpret Sections 6 paras 1 and 9 to the effect that in any case a link was required with Germany for German courts to exercise jurisdiction (see thereon Ambos and Wirth, ‘Genocide and War Crimes in the Former Yugoslavia before German Criminal Courts’, in H. Fischer, C. Kress and S. Rolf Luder (eds), *International and National Prosecution of Crimes under International Law* (2001), 778), in *Sokolovic* the Federal Supreme Court held that a factual link was not required. The Court noted that in its decision of 29 November 1999 that the Court of Appeal (*Oberlandsgericht Dusseldorf*), following the traditional German case law, had held that a factual link was required by law (*legitimierender Anknüpfungspunkt*) for a German court to exercise jurisdiction over crimes committed abroad by foreigners (in the case at issue the offender was a Bosnian Serb accused of complicity in genocide perpetrated in Bosnia). The Court of Appeal had found this link in the fact that the accused had lived and worked in Germany from 1969 to 1989 and had thereafter regularly returned to Germany to collect his pension and also to seek work. After recalling these findings by the Court of Appeal, the Supreme Court added: ‘The Court however inclines, in any case under Article 6 para. 9 of the German Criminal Code, not to hold as necessary these additional factual links that would warrant the exercise of jurisdiction . . . Indeed, when, by virtue of an obligation laid down in an international treaty, Germany prosecutes and punishes under German law an offence committed by a foreigner abroad, it is difficult to speak of an infringement of the principle of non-intervention’ (Judgment of 21 February 2001, 3 StR 372/00, still unreported, at 19–21 of the typescript in German).

¹⁷⁵³ In a document submitted in 1998 to the Preparatory Committee drafting the Statute, Germany stated the following: ‘Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims, and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every state can exercise its own national criminal jurisdiction, regardless of whether the custodial State, territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice.’ (UN Doc.A/AC.249/1998/DP.2, 23 March 1998).

international criminal law proposed by the German government and now pending before the German Bundesrat (Senate), namely the Entwurf eines Gesetzes zur Einführung des Volkerstrafgesetzbuches, provides that German law applies to all criminal offences against international law envisaged in the law (namely genocide, crimes against humanity, war crimes), even when the criminal conduct occurs abroad and does not show any link with Germany.¹⁷⁵⁴

All of these elements of state practice, in addition to showing that states tend increasingly to resort to absolute universal jurisdiction for the purpose of safeguarding universal values, also point to the gradually increasing diffusion and acceptance of the notion that this form of jurisdiction is regarded as admissible under international law.

14.5 The Court's Failure to Distinguish between Immunities Ratione Materiae (or Functional Immunities) and Immunities Ratione Personae (or Personal Immunities)

Let us move on to the second issue on which one can respectfully disagree with the Court, namely its failure to draw a distinction between two different categories of immunities from foreign jurisdiction: (i) those which a foreign minister, like any state official, enjoys for any official act (so-called functional, or *ratione materiae*, or organic immunities), and (ii) those which instead are intended to cover any act that some classes of state officials perform while in office (so-called personal or, with regard to diplomatic agents, diplomatic immunities).¹⁷⁵⁵

¹⁷⁵⁴ *‘Dieses Gesetz gilt für alle in ihm bezeichneten Straftaten gegen das Völkerrecht, für die in ihm bezeichneten Verbrechen auch dann, wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist.’* (see Bundesrat, Drucksache 29/02, 18 January 2002, *Gesetzentwurf der Bundesregierung*, at 3; German text online at www.bmj.bund.de/images/10185.pdf). See the precisions made in the Commentary, at 29).

¹⁷⁵⁵ Perhaps the Court hinted at this distinction in para. 60 of its judgment, when it stated that ‘Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibilities’. However, what the Court states both before and after these propositions would seem to disregard the fundamental importance of the distinction referred to above.

The first category is grounded on the notion that a state official is not accountable to other states for acts that he accomplishes in his official capacity and that therefore must be attributed to the state. The second category is predicated on the notion that any activity of a head of state or government, or diplomatic agent¹⁷⁵⁶ or foreign minister must be immune from foreign jurisdiction to avoid foreign states either infringing sovereign prerogatives of states or interfering with the official functions of a foreign state agent under the pretext of dealing with an exclusively private act (*ne impediatur legatio*). This distinction, oddly denied by Belgium in its Counter-Memorial,¹⁷⁵⁷ is made in the legal literature,¹⁷⁵⁸ and is based on state practice. With regard to the first class of immunities, suffice it to refer to the famous McLeod incident and the Rainbow Warrior case¹⁷⁵⁹ as well as some recent judicial decisions (one can mention the judgment rendered by the

¹⁷⁵⁶ However, as is well known, international rules provide for exceptions to immunities of diplomatic agents for private acts (see Article 31 para. 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961).

¹⁷⁵⁷ See Counter-Memorial of the Kingdom of Belgium, of 28 September 2001, at 33, para 3.5.141.

¹⁷⁵⁸ See, e.g., G. Morelli, *Nozioni di diritto internazionale* (1943, 7th ed., 1967), at 215–216; H. Kelsen, *Peace through Law* (1944), at 81–86; Niboyet, ‘Immunité de juridiction et incompétence d’attribution’, 39 *RCDIP* (1950), 139; H. Kelsen, *Principles of International Law* (1952), at 236–237 (according to Kelsen, ‘the principle that no state has jurisdiction over another state excludes individual - civil or criminal — responsibility for acts of state’); G. Dahm, *Volkerrecht*, vol. I, (1958), at 225, 237, 303–305, 338–339 (also for Dahm the immunity of state organs for officials acts is a consequence of state immunity); G. Sperduti, *Lezioni di diritto internazionale* (1958), at 117–121; Giuliano, ‘Les relations et immunités diplomatiques’, in 100 *HR* (1960-II), at 166–180 (only with reference to the functions of diplomatic agents); van Panhuys, ‘In the Borderland between the Act of State Doctrine and Questions of Jurisdictional Immunities’, 13 *ICLQ* (1964), 1193, at 1205–1208; Seyersted, ‘Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organizations’, 14 *ICLQ* (1965), 31–82 and 493–527, at 33–43; Dinstein, ‘Diplomatic Immunity from Jurisdiction *ratione materiae*’ 15 *ICLQ* (1966), at 76–89; Bothe, ‘Die strafrechtliche Immunität fremder Staatsorgane’, in 31 *Zeit. Ausl. Off. Recht Volk* (1971) 246; Akehurst, ‘Jurisdiction in International Law’ 46 *BYbIL* (1972–3), 240–244; A. Verdross and B. Simma, *Universelles Volkerrecht* (3rd ed., 1984), at 773–774 (para. 1177); R. Jennings and A. Watts (eds), *Oppenheim’s International Law*, vol. I (9th ed., 1992), at 346; I. Brownlie, *Principles of Public International Law* (5th ed., 1998), at 361–362; P. De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (1996), esp. at 109–250; P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th ed., 1997), at 122; A. Cassese, *International Law* (2001), at 93–96; Zappala, ‘Do Heads of States in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French *Cour de Cassation*’, 12 *EJIL* (2001), 595; Gaeta, ‘Official Capacity and Immunities’, in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court - A Commentary*, vol. 1 (2002) 975–1002.

¹⁷⁵⁹ For the McLeod case, see *British and Foreign Papers*, vol. 29, at 1139, as well as Jennings, ‘The Caroline and McLeod Cases’, 32 *AJIL* (1938), at 92–99; for the Rainbow Warrior case, see *UN Reports of International Arbitral Awards*, XIX, at 213. See also the Governor Collot case, in J. B. Moore, *A Digest of International Law*, vol. II (1906), at 23–24.

Supreme Court of Israel in Eichmann¹⁷⁶⁰ and that delivered by the ICTY Appeals Chamber in Blaskic (subpoena)¹⁷⁶¹).

The distinction is relevant, for the first class of immunity (i) relates to substantive law, that is, it is a substantive defence (although the state agent is not exonerated from compliance with either international law or the substantive law of the foreign country, if he breaches national or international law, this violation is not legally imputable to him but to his state; in other words, individual criminal or civil liability does not even arise); (ii) covers official acts of any *de jure* or *de facto* state agent; (iii) does not cease at the end of the discharge of official functions by the state agent (the reason being that the act is legally attributed to the state, hence any legal liability for it may only be incurred by the state); (iv) is *erga omnes*, that is, may be invoked towards any other state.

In contrast, the second class of immunities (i) relates to procedural law, that is, it renders the state official immune from civil or criminal jurisdiction (it is a procedural defence); (ii) covers official or private acts carried out by the state agent while in office, as well as private or official acts performed prior to taking office; in other words, assures total inviolability; (iii) is intended to protect only some categories of state officials, namely diplomatic agents, heads of state, heads of government, perhaps (in any case under the doctrine set out by the Court) foreign ministers and possibly even other senior members of cabinet; (iv) comes to an end after cessation of the official functions of the state agent; (v) may not be *erga omnes* (in the case of diplomatic agents it is only applicable with regard to acts performed as between the receiving and the sending state, plus third states whose territory the diplomat may pass through while proceeding to take up, or to return to, his post, or when returning to his own country: so called *jus transitus innoxii*).

¹⁷⁶⁰ Judgment of the Supreme Court of Israel of 29 May 1962, in 36 ILR, 277–342, at 308–309.

¹⁷⁶¹ See *Blaskic (subpoena)*, ICTY Appeals Chamber's judgment of 29 October 1997, at paras 38 and 41. For other cases see in particular Bothe, *supra* note 26, at 248–253.

14.6 The Distinction between the Two Classes of Immunities and the Coming into Operation of the Rule Removing Functional Immunities for International Crimes

The above distinction is important. It allows us to realize that the two classes of immunity coexist and somewhat overlap as long as the foreign minister (or any state official who may also invoke personal or diplomatic immunities) is in office. While he is discharging his official functions, he always enjoys functional immunity, subject to one exception that we shall soon see, namely in the case of perpetration of international crimes. Nevertheless, even when one is faced with that exception, the foreign minister is inviolable and immune from prosecution on the strength of the international rules on personal immunities. This proposition is supported by some case law (for instance, Pinochet¹⁷⁶² and Fidel Castro,¹⁷⁶³ which relate respectively to a former and an incumbent head of state), and is authoritatively borne out by the Court's judgment under discussion. In contrast, as soon as the foreign minister leaves office, he may no longer enjoy personal immunities and, in addition, he becomes liable to prosecution for any international crime he may have perpetrated while in office. This is rendered possible by a customary international rule on international crimes that has evolved in the international community. The rule provides that, in case of perpetration by a state official of such international crimes as genocide, crimes against humanity, war crimes, torture (and I would add serious crimes of international, state-sponsored terrorism), such acts, in addition to being imputed to the state of which the individual acts as an agent, also involve the criminal liability of the individual. In other words, for such crimes there may coexist state responsibility and individual criminal liability.

That such a rule has crystallized in the world community is evidenced by a whole range of elements: not only the provisions of the various treaties or other international instruments on international tribunals, but also international and national case law (see below). The Court has instead taken a rather ambiguous

¹⁷⁶² See references *infra* in note 39.

¹⁷⁶³ See reference *supra* in note 21.

stand on the existence and purport of this rule. Addressing the Belgian contention that immunities accorded to incumbent foreign ministers do not protect them when they are suspected of international crimes, and the contrary submission of the Congo, the Court first excluded the existence of a specific customary rule lifting immunity from criminal jurisdiction for incumbent foreign ministers accused of those crimes; it then considered the provisions of the various international tribunals, whereby the official position of defendants does not free them from criminal responsibility; it concluded that 'rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals' only apply to such tribunals. No 'such an exception exists in customary international law in regard to national courts'.¹⁷⁶⁴

Although the Court's proposition is very sweeping, the context of the Court's ruling would seem to indicate that the Court did not intend to deny the possible existence of a customary rule lifting functional immunities for state officials in the case of international crimes. In fact, it did not take any stand on such a customary rule. What it intended to state was that in any case such a rule, assuming it existed, did not remove that immunity for incumbent senior state officials.

If this is so, it is respectfully submitted that the Court's proposition is questionable. It seems warranted to argue that the customary rule at issue (on whose existence and purport I shall come back to below) has a broad scope and importance and does not distinguish between incumbent and former state officials. The treaty provisions that are at the origin of this customary rule point in this direction. Article 7 of the Charter of the Nuremberg International Military Tribunal and all the subsequent treaties or at any rate written stipulations providing in this regard clearly intended to remove the substantial defence based on the official status of the accused with regard both to incumbent and former

¹⁷⁶⁴ Para. 58 of the judgment. It should be stressed that the clear wording of the Court's holding (in the second paragraph of para. 58 of the judgment) excludes that such holding is *only* intended to apply to foreign ministers. In other words, it seems clear that the Court has ruled out the existence of a customary rule concerning *any* state official, not solely foreign ministers.

state agents. Actually, given the historical circumstances in which those provisions were adopted, it can be said that they were primarily intended to cover persons who were state officials when they committed the alleged crime, but no longer had such status when brought to trial.

Should one consequently conclude that under customary international law the lifting of functional immunities in case of international crimes, brought about by this rule, entails that an incumbent foreign minister may be brought to trial before a national court for such alleged crimes? The answer is no. However, this is so only because that minister is protected by the general rules on personal immunities, as long as he is in office of course. In this respect the Court may be right in pointing to a difference between the provisions of statutes of international tribunals and the customary rule (at least, the Court is right with regard to the practice of the ICTY¹⁷⁶⁵ and the text of the ICC Statute¹⁷⁶⁶). Under customary law the rule we are discussing must be applied in conjunction with, and in the light of, customary rules on personal immunities, whereas the statutes of international criminal tribunals and courts (other than the ICC, where the text is clear) may perhaps be construed as removing, at treaty level, even personal immunities.

The above propositions are borne out by some recent cases, such as the decision mentioned above of the Spanish Audiencia nacional in Fidel Castro,¹⁷⁶⁷ by the French Court of Cassation on 13 March 2001 in Ghadafi, or the decision of the House of Lords in Pinochet. In Fidel Castro, the Spanish court clearly stated that as long as the Cuban head of state was in office, no prosecution could be initiated against him, on account of his entitlement to enjoy personal immunities. In Ghadafi the French Court held that 'la coutume internationale s'oppose a ce que les chefs d'Etats en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernees, faire

¹⁷⁶⁵ See the indictment made by the chief Prosecutor against Milosevic when he was an incumbent head of state. The indictment was confirmed by a Judge and did not give rise to any objection from other states.

¹⁷⁶⁶ See Articles 27 and 98 of the ICC Statute.

¹⁷⁶⁷ See *supra* note 21.

l'objet de poursuites devant les juridictions pénales d'un Etat étranger'.¹⁷⁶⁸ This view is absolutely compatible with the rule whereby state officials accused of international crimes may not plead as a defence, before national or international courts, their having acted in an official capacity. Indeed, as stated above, under customary international law this rule only becomes operational after the state official's cessation of functions. The shield protecting state agents from criminal jurisdiction is only removed after that moment. The same holds true for Pinochet, where their Lordships held that he would have enjoyed immunities were he still in office as head of state, but that, having left office, he no longer enjoyed such (personal) immunities.¹⁷⁶⁹

14.7 The Court's Ruling on the Immunity of Former Foreign Ministers from Criminal Jurisdiction A The Questionable Resort to the Distinction between Private and Official Acts

The Court has admittedly recognized that personal or diplomatic immunities are only procedural in nature. Thus, it states in paragraph 60 of its judgment that 'the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility'.

This proposition is indisputably sound and must be subscribed to. However, in the following paragraph of its judgment, in an important obiter dictum, the Court infers from that proposition (paragraph 61 starts with 'Accordingly') that the

¹⁷⁶⁸ See text in 105 *RGDIP* (2001), at 474.

¹⁷⁶⁹ See, e.g., the speech of Lord Browne-Wilkinson, in *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, House of Lords, Judgment of 24 March 1999, in [1999] 2 All ER, at 112–115, as well as those of Lord Hope of Craighead, at 145–152, Lord Saville of Newdigate, at 169–170, Lord Millett, at 171–191 and Lord Phillips of Worth Matravers, at 181–190.

immunities enjoyed under international law by an incumbent foreign minister do not represent a bar to criminal prosecution in four different circumstances that, as it would seem from the text of the judgment, are given as an exhaustive enumeration:¹⁷⁷⁰ (i) when the national state institutes proceedings against its state official; (ii) when the national state (or the state for which the person acts as an agent) waives the immunities; (iii) when the person has ceased to discharge his official functions; at that stage '[p]rovided that it has jurisdiction under international law, a court of one state may try a former Minister for Foreign Affairs of another state in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity'; (iv) when an incumbent or former foreign minister may be subject to criminal proceedings before an international criminal court.

In this paper I shall concentrate on the third hypothesis (some of the Judges to the case set forth cogent misgivings on the first two in their Joint Separate Opinion,¹⁷⁷¹ while the fourth hypothesis obviously becomes relevant when treaty law or binding international instruments such as Security Council resolutions taken under Chapter VII are at stake). One can raise two important objections to the Court's holding concerning this third hypothesis.

First, the Court wrongly resorted, in the context of alleged international crimes, to the distinction between acts performed 'in a private capacity' and 'official acts', a distinction that, within this context, proves ambiguous and indeed untenable. Second, the Court failed to apply, or at least to refer to, the customary rule lifting functional immunities for international crimes allegedly committed by state agents, a rule that becomes operational as soon as the rules on personal immunities are no longer applicable (or in other words, as soon as state agents enjoying personal immunities are no longer in office).

¹⁷⁷⁰ Curiously, in a Press Statement of 14 February 2002, President Guillaume, in summarizing the Court's judgment, stated that the Court 'also pointed out that immunity from jurisdiction and individual criminal responsibility are two separate concepts' and went on to say '*By way of example*, the Court emphasized that Ministers for Foreign Affairs' did not enjoy immunity in the cases mentioned by the Court (emphasis added).

¹⁷⁷¹ See Joint Separate Opinion, *supra* note 3, at para. 78.

Let me expound the first objection. For this purpose, it may prove helpful to envisage four different hypothetical cases: (i) a foreign minister orders, aids and abets or willingly participates in, genocide or crimes against humanity before assuming his official functions of foreign minister (for example, when he was a senior member of the military); (ii) a foreign minister orders or aids and abets or willingly participates in the commission of genocide or crimes against humanity while acting as foreign minister; (iii) a person steals goods or bribes state officials before becoming foreign minister; (iv) a foreign minister, while in office, kills his servant in a fit of rage.

Under the Court's proposition, once the foreign minister has terminated his ministerial functions, he may be brought to trial before a foreign court having jurisdiction under international law for acts perpetrated prior to his taking office (cases sub (i) and (iii)); instead, if he engages in criminal offences while in office, he may be prosecuted and punished only if those acts are considered as being performed 'in a private capacity' ('à titre privé'). If this is so, it would follow that he could only be prosecuted for the murder of his servant (case sub (iv)). What about international crimes? Can international crimes such as genocide or crimes against humanity be regarded as being committed 'in a private capacity'?

It would seem warranted to infer from the holding of the Court that, as crimes are not normally committed 'in a private capacity', state agents do enjoy immunity for these crimes, even if they have terminated their official functions. That international crimes are not as a rule 'private acts' seems evident. These crimes are seldom perpetrated in such capacity. Admittedly, a civilian or a serviceman acting in a private capacity may indeed commit war crimes (think for instance of the rape or torture of an enemy civilian). It is however hardly imaginable that a foreign minister may perpetrate or participate in the perpetration of an international crime 'in a private capacity'. Indeed, individuals commit such crimes by making use (or abuse) of their official status. It is primarily through the position and rank they occupy that they are in a position to order, instigate, or aid and abet or culpably tolerate or condone such crimes as genocide or crimes against humanity or grave breaches of the Geneva Conventions. In the case of torture

(not as a war crime or a crime against humanity), the ‘instigation or consent or acquiescence of a public official or other person acting in an official capacity’ is one of the objective requirements of the crime (see Article 1 of the 1984 Convention against Torture).

Hence, if one construes the legal propositions of the Court literally, it would follow that foreign ministers could never, or in any event rarely, be prosecuted for international crimes perpetrated while in office. However, a more radical question to be raised is as follows: why should one confine trials by foreign courts to acts performed ‘in a private capacity’? Which international rules would exclude official acts?

In fact, the distinction between ‘private’ and ‘official’ acts made by the Court with regard to international crimes that may have been committed by a foreign minister while in office, has a twofold origin. First, it is the transposition to the area of immunities of foreign ministers of the well-established distinction, applicable to diplomatic agents, between their private and their official acts (the latter being, pursuant to Article 39(2) of the Vienna Convention on diplomatic immunities, the ‘acts performed by such a person [i.e. a diplomatic agent] in the exercise of his functions as a member of the mission’).¹⁷⁷² This distinction is designed to emphasize that, when his functions come to an end, the diplomatic agent stops enjoying personal immunities, whereas ‘with respect to acts performed . . . in the exercise of his functions as a member of the [diplomatic]

¹⁷⁷² It seems less probable that the distinction under discussion is a transposition of, or grounded on, the old distinction between acts performed by states *jure gestionis* (that is, acts of a commercial nature), and acts done *jure imperii*. As is well known, this is a relatively outmoded distinction made in recent international law with regard to acts of states and aimed at establishing when a state enjoys immunity from the *civil* (not criminal) jurisdiction of foreign states. While this distinction makes sense with regard to privileges and immunities of foreign states, it does not hold water with regard to functional (or organic) immunity of *state officials*. Let me give an example: if a foreign minister signs abroad, on behalf of his state, a contract for the purchase of a building to house the state’s embassy, and then fails to pay, he may not be sued, for he is covered by functional and personal immunities (on account of the former he may not be sued even after leaving office), whereas the state may be (under the restrictive doctrine of state immunity). If, in contrast, the foreign minister, after participating in a cabinet decision for the expulsion of nationals of a particular country, contrary to treaty provisions, is sued before the courts of that country for compensation, he again is sheltered by functional and personal immunity; in addition, the state enjoys immunity from jurisdiction for the act was clearly done *jure imperii*, with the consequence that the matter may only be settled at a diplomatic or political level. As is clear from these examples, the distinction at issue may be germane to acts of states, but is irrelevant to acts performed by state officials.

mission, immunity shall continue to exist'. The distinction, however, in addition to being of rather complex application,¹⁷⁷³ only applies, even in relation to diplomatic agents, as long as the customary rule removing functional immunities of state agents in the case of international crimes does not come into operation. A fortiori the distinction evaporates as a result of that customary rule when what is at stake are the acts of foreign ministers that may amount to international crimes. Secondly, the distinction seems to derive from that between 'official' and 'unofficial public acts' made by some US courts in cases where actions for damage in tort had been brought against foreign states for acts of torture by state officials.¹⁷⁷⁴ This distinction manifestly aimed at arguing that, as torture could not be regarded as an official public act, the foreign state at issue could not claim state immunity from US jurisdiction. In other words, the distinction was a practical expedient for circumventing the strictures of the US Act on state immunities (the Foreign Sovereign Immunities Act of 1976, as amended in 1988). Although in this respect it was meritorious, it is however unsound and even preposterous from the strictly legal viewpoint.¹⁷⁷⁵

The distinction under discussion, if applied to international crimes committed by senior state officials, could lead to the consequence that such crimes should be considered as 'private acts' in order that their authors be amenable to judicial process. The artificiality of this legal construct is evident. This would mean, for example, that the crimes for which Joachim von Ribbentrop (Reich Minister for Foreign Affairs from 1938 to 1945) was sentenced to death, namely crimes

¹⁷⁷³ As Brownlie, *supra* note 28, points out (at 361), 'The definition of official acts is by no means self-evident.'

¹⁷⁷⁴ See for instance *Filartiga v. Pena Irala*, 630 F.2d 876 (2nd Cir. 1980), *Forti v. Suarez Mason*, 672 F.Supp.1531 (ND Cal 1987), *Evans and others v. Avril*, 812 F.Supp.207 (SD Florida, 1993). On these cases see Bianchi, 'Denying State Immunity to Violators of Human Rights' 46 *Austrian Journal of Public and International Law* (1994), 227–228. See also *Xuncax v. Gramajo*, 886 F.Supp.162 (DMA, 12 April 1995). Some Lords in *Pinochet* (iii) have taken up the distinction. See for instance the speeches of Lord Goff of Chieveley (at 125–126), of Lord Hutton (at 165), and of Lord Phillips of Worth Matravers (at 187). Lord Slynn and Lord Lloyd had propounded the same view in their speeches in the first judgment by the House of Lords in the same case (Judgment of 25 November 1998, in 37 ILM (1998), at 1309 and 1323 respectively).

¹⁷⁷⁵ It should be noted that three Judges were aware of the possible consequences of the Court's proposition. In their Joint Separate Opinion, Judges Higgins, Kooijmans and Buergenthal mentioned the view that international crimes may not be regarded as 'official acts' 'because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform' (para. 85). It would however seem that they did not necessarily endorse such view.

against peace, war crimes and crimes against humanity, should be regarded as 'private acts';¹⁷⁷⁶ or that the crime of having failed 'to secure observance of and prevent breaches of the laws of war', for which Mamoro Shigemitsu (Japanese Foreign Minister from 1943 to 1945) was sentenced to seven years' imprisonment, should be considered 'private acts'.¹⁷⁷⁷

B The Court's Failure to Refer to the Customary Rule Lifting Functional Immunities for State Officials Accused of International Crimes

Let me now move on to my second objection to the Court's decision. On the question of the amenability to trial of former state agents accused of committing international crimes while in office, the Court, instead of relying upon the questionable distinction between private and official acts, should clearly have adverted to the customary rule that removes functional immunity.

National case law proves that a customary rule with such content does in fact exist. Many cases where military officials were brought to trial before foreign courts demonstrate that state agents accused of war crimes, crimes against humanity or genocide may not invoke before national courts, as a valid defence, their official capacity (leaving aside cases where tribunals adjudicated on the strength of international treaties or Control Council Law no. 10, one can recall, for instance, Eichmann in Israel,¹⁷⁷⁸ Barbie in France,¹⁷⁷⁹ Kappler and Priebke in Italy,¹⁷⁸⁰ Rauter, Albrecht and Bouterse in the Netherlands,¹⁷⁸¹ Kesserling

¹⁷⁷⁶ For the charges against him see *Trial of the Major War Criminals before the International Military Tribunal - Nuremberg 14 November 1945–1 October 1946*, Nuremberg 1947, I, at 69; for the Judgment see *ibid.*, at 285–288.

¹⁷⁷⁷ For the judgment of the IMTFE concerning Shigemitsu, see B. V. A. Roling and C. F. Ruter (eds), *The Tokyo Judgment* vol. I (1977), at 457–458.

¹⁷⁷⁸ See judgment of the Supreme Court of Israel of 29 May 1962, in 36 ILR, 277–342.

¹⁷⁷⁹ See the various judgments in 78 ILR, 125 *et seq.*, and 100 ILR 331 *et seq.*

¹⁷⁸⁰ For *Kappler*, see the Judgment delivered on 25 October 1952 by the *Tribunal Supremo Militare*, in 36 *Rivista di diritto internazionale* (1953) 193–199; as for *Priebke* see the decision of the Rome Military Court of Appeal of 7 March 1998, in *L'Indice Penale* (1999), 959 *et seq.*

¹⁷⁸¹ For *Rauter* see the decision of the Special Court of Cassation of 12 January 1949, in *Annual Digest 1949*, 526–548; for *Albrecht* see the judgment of the Special Court of Cassation of 11 April 1949 in

before a British Military Court sitting in Venice and von Lewinski (called von Manstein) before a British Military Court in Hamburg,¹⁷⁸² Pinochet in the UK,¹⁷⁸³ Yamashita in the US,¹⁷⁸⁴ Buhler before the Supreme National Tribunal of Poland,¹⁷⁸⁵ Pinochet and Scilingo in Spain,¹⁷⁸⁶ Miguel Cavallo in Mexico¹⁷⁸⁷). True, most of these cases deal with military officers. However, it would be untenable to infer from that that the customary rule only applies to such persons. It would indeed be odd that a customary rule should have evolved only with regard to members of the military and not for all state agents who commit international crimes. Besides, it is notable that the Supreme Court of Israel in Eichmann¹⁷⁸⁸ and more recently various Trial Chambers of the ICTY have held that the provision of, respectively, Article 7 of the Charter of the IMT at Nuremberg and Article 7(2) of the Statute of the ICTY (both of which relate to any person accused of one of the crimes provided for in the respective Statutes) 'reflect[s] a rule of customary international law' (see Karadzic and others,¹⁷⁸⁹ Furundzija,¹⁷⁹⁰ and Slobodan Milosevic (decision on preliminary motions)).¹⁷⁹¹ Furthermore, Lords Browne-Wilkinson, Hope of Craighead, Millett, and Phillips of Worth Matravers in their speeches for the House of Lords' decision of 24 March

Nederlandse Jurisprudentie 1949, 747–751 (in Dutch), summarized in *Annual Digest* 1949, 397–398; for *Bouterse*, see the decision of 20 November 2000 of the Amsterdam Court of Appeal online, at www.icj.org/objectives/decision.html.

¹⁷⁸² See *von Lewinski* in *Annual Digest* 1949, 523–524; for *Kesserling* see *Law Reports of Trials of War Criminals* (1947), vol. 8, at 9 ff.

¹⁷⁸³ See references in note 39.

¹⁷⁸⁴ See the judgment of the US Supreme Court in L. Friedman, *The Law of War, A Documentary History*, vol. II, (1972), at 1599 *et seq.*

¹⁷⁸⁵ See *Annual Digest* 1948, at 682.

¹⁷⁸⁶ See references in *supra* notes 20 and 21.

¹⁷⁸⁷ See the decision of 12 January 2001 delivered by Judge Jesus Guadalupe Luna and authorizing the extradition of Ricardo Miguel Cavallo to Spain, text (in Spanish) on line in www.derechos.org/nizkor/arg/espana/mex.html.

¹⁷⁸⁸ *Supra* note 30, at 311.

¹⁷⁸⁹ ICTY, Trial Chamber I, Decision of 16 May 1995, at para. 24.

¹⁷⁹⁰ ICTY, Trial Chamber II, Judgment of 10 December 1998, at para. 140.

¹⁷⁹¹ ICTY, Trial Chamber III, Decision of 8 November 2001, at para. 28 and more generally paras 26–33.

1999 in Pinochet took the view, with regard to any senior state agent, that functional immunity cannot excuse international crimes.¹⁷⁹²

In addition, important national Military Manuals, for instance those issued in 1956 in the United States and in 1958 in the United Kingdom, expressly provide that the fact that a person who has committed an international crime was acting as a government official (and not only as a serviceman) does not constitute an available defence.¹⁷⁹³

One can also recall that on 11 December 1946 the UN General Assembly unanimously adopted Resolution 95, whereby it ‘affirmed’ ‘the principles recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal’. These principles include Principle III, as later formulated (in 1950) by the UN International Law Commission.¹⁷⁹⁴ All of these Principles, Israel’s Supreme Court noted in Eichmann, ‘have become part of the law of nations and must be regarded as having been rooted in it also in the past’.¹⁷⁹⁵

Furthermore, it seems significant that, at least with regard to one of the crimes at issue, genocide, the International Court of Justice implicitly admitted that under

¹⁷⁹² See *supra* note 39, at 107–115 (Lord Browne-Wilkinson), 146–153 (Lord Hope of Craighead), 171–179 (Lord Millet) and 188–192 (Lord Phillips of Worth Matravers).

¹⁷⁹³ See the US Department of the Army Field Manual, *The Law of Land Warfare* (July 1956). At para. 498 it states that: ‘Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such offenses in connection with war comprise: *a.* Crimes against peace; *b.* Crimes against humanity; *c.* War crimes. Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constituting “war crimes”.’ At para. 510 it is stated that: ‘The fact of a person who committed an act which constitutes a war crime acted as the head of a state or as a responsible government official does not relieve him from responsibility for his act.’

See also the British manual, *The Law of War on Land* (1958), at para. 632 (‘Heads of States and their ministers enjoy no immunity from prosecution and punishment for war crimes. Their liability is governed by the same principles as those governing the responsibility of State officials except that the defence of superior orders is never open to Heads of States and is rarely open to ministers’).

¹⁷⁹⁴ Principle II provides as follows: ‘The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law’. See *YbILC* (1950, II), at 192.

¹⁷⁹⁵ *Supra* note 30, at 311.

customary law any official status does not relieve responsibility. In its Advisory Opinion on Reservations to the Convention on Genocide, the Court held that ‘the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation’.¹⁷⁹⁶ Among these principles one cannot but include the principle underlying Article IV, whereby ‘Persons committing genocide shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.’ It is notable that the UN Secretary-General took the same view of the customary status of the Genocide Convention (or, more accurately, of the substantive principles it lays down), a view that was endorsed implicitly by the UN Security Council,¹⁷⁹⁷ and explicitly by a Trial Chamber of the ICTR in *Akayesu* and of the ICTY in *Krstic*.¹⁷⁹⁸

A further element supporting the existence of a customary rule having a general purport can be found in the pleadings of the two states before the Court: the Congo and Belgium. In its Memoire of 15 May 2001, the Congo explicitly admitted the existence of a principle of international criminal law, whereby the official status of a state agent cannot exonerate him from individual responsibility for crimes committed while in office; the Congo also added that on this point there was no disagreement with Belgium.¹⁷⁹⁹

Arguably, while each of these elements of practice, on its own, cannot be regarded as indicative of the crystallization of a customary rule, taken together they may be deemed to evidence the formation of such a rule (a rule, it should be added, on whose existence legal commentators seem to agree, although

¹⁷⁹⁶ ICJ Reports (1951), at 24.

¹⁷⁹⁷ See Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, at para. 45.

¹⁷⁹⁸ ICTR, Trial Chamber I, judgment of 2 September 1998, at para. 495; ICTY, Trial Chamber I, judgment of 2 August 2001, at para. 541.

¹⁷⁹⁹ *Memoire*, at 39, para. 60 (<< . . . la R.D.C. ne conteste pas qu’est un principe de droit international penal, notamment forge par les jurisprudences de Nuremberg et de Tokyo, la regle suivant laquelle la qualite officielle de l’accuse au moment des faits ne peut pas constituer une cause d’exoneration de sa responsabilite penale ou un motif de reduction de sa peine lorsqu’il est juge, que ce soit par une jurisdiction interne ou une juridiction internationale. Sur ce point, aucune divergence existe avec l’Etat belge.>>)

admittedly without producing compelling evidence concerning state or judicial practice,¹⁸⁰⁰ and which the Institut de droit international has recently restated, at least with regard to heads of state or government).¹⁸⁰¹

Let me emphasize that the logic behind this rule, which was forcefully set out as early as 1945 by Justice Robert H. Jackson in his Report to the US President on the works for the prosecution of major German war criminals,¹⁸⁰² is in line with contemporary trends in international law. At present, more so than in the past, it is state officials, and in particular senior officials, that commit international crimes. Most of the time they do not perpetrate crimes directly. They order, plan, instigate, organize, aid and abet or culpably tolerate or acquiesce, or willingly or negligently fail to prevent or punish international crimes. This is why 'superior responsibility' has acquired, since Yamashita (1946), such importance. To allow these state agents to go scot-free only because they acted in an official capacity, except in the few cases where an international criminal tribunal has been established or an international treaty is applicable, would mean to bow to and

¹⁸⁰⁰ See, e.g., Glaser, 'L'Acte d'Etat et le probleme de la responsabilite individuelle', *Revue de droit penal et de criminologie* (1950), 1 *et seq*; S. Glaser, *Introduction à l'Etude du Droit International Penal* (1954), at 71–76; G. Hoffmann, *Strafrechtliche Verantwortung im Völkerrecht – Zum gegenwärtigen Stand des Völkerrechtlichen Strafrechts* (1962), at 135–139 (only with regard to war crimes); Bothe, *supra* note 28, at 254–257; Akehurst, *supra*, note 28, at 241; Dinstein, 'International Criminal Law', in 5 *Israel Yearbook on Human Rights* (1975), at 82–83; De Sena, *supra* note 28, at 139–187; Malanczuk, *supra* note 28, at 122; Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 *EJIL* (1999), at 259–260, 269–270.

¹⁸⁰¹ See the Resolution on 'Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law' adopted at the Session of Vancouver (August 2001). At Article 13(2) it is stated that, although a former head of state (or government) enjoys immunity in respect of acts performed in the exercise of official functions and related to the exercise thereof, he or she nevertheless may be prosecuted and tried 'when the acts alleged constitute a crime under international law'.

¹⁸⁰² In his Report to the US President of 6 June 1945, Justice R. H. Jackson (who had been appointed by President Roosevelt as 'Chief Counsel for the United States in prosecuting the principal Axis War Criminals') illustrated as follows the first draft of Article 7 of the London Agreement (whereby 'The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment'), contained in a US memorandum presented at San Francisco on 30 April 1945: 'Nor should such a defence be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Justice Coke, who proclaimed that even a King is still "under God and the law"' (in *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, London 1945*, US Department of State, 1949, at 47).

indeed strengthen traditional concerns of the international community (chiefly, respect for state sovereignty), which in the current international community should instead be reconciled with new values, such as respect for human dignity and human rights. These last values require that all those who gravely attack human dignity and fundamental rights be prosecuted and punished.

To ignore or play down the customary rule in question may lead to ensuring impunity for the perpetrators as well as denying compensation to the victims, given that in such cases, although the state on whose behalf the authors of crimes acted formally incurs responsibility, in practice it is not held accountable by anybody. Furthermore, as no one denies that soldiers and other military personnel may be brought to trial for war crimes (but also for crimes against humanity or genocide), one would come to the preposterous conclusion that lower-ranking state agents could be punished for such crimes, while those in power (heads of states or governments, senior members of cabinet, senior military commanders), who are endowed with greater power and normally bear greater responsibility for international crimes, would be absolved of any liability for participation in such crimes, only on account of their seniority.

14.8 The Court's Balancing of the Requirements of State Sovereignty with the Demands of International Justice

Finally, the Court's judgment lends itself to some general considerations. The Court of course had to strike a balance between two conflicting requirements, which were lucidly expounded by Judges Higgins, Kooijmans and Buerghenthal.¹⁸⁰³ They are the requirements of smooth and unimpaired conduct of foreign relations, a traditional concern of sovereign states, on the one side, and the need to safeguard new community values, in particular the need to prosecute and punish the perpetrators of grave crimes seriously infringing fundamental rights of human beings, on the other side. In the event, the Court put greater weight on one scale of the balance and markedly favoured the former requirements. Absent any state practice or *opinio juris seu necessitatis*, it

¹⁸⁰³ See Joint Separate Opinion, *supra* note 3 at paras 73–75.

logically deduced from the whole system of the law of international immunities that foreign ministers enjoy a broad range of immunities while in office. However, by ambiguously excluding that state agents could be brought to trial after leaving office for acts other than 'private' ones performed while in office, the Court has arguably left in the event the demands of international justice unheeded. One might be tempted to recall what another international court had the opportunity to state in general terms, admittedly in a different context: 'It would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights.'¹⁸⁰⁴

The holding of the Court is indeed striking, the more so because, it is submitted, the legal regulation that can be deduced from current international law manages to protect both sets of requirements in a balanced way. As stated above, as long as a foreign minister is in office, he enjoys full immunity from foreign jurisdiction and inviolability, for whatever act he may perform. However, once he leaves office, he may continue to be shielded from foreign criminal or civil jurisdiction for the acts he performed in his official capacity (under the rules on functional immunities), but not (i) for his private acts and transactions; in addition, (ii) he may no longer take shelter behind personal (or functional) immunities, with respect to international crimes such as genocide, crimes against humanity, war crimes, torture, and serious international acts of terrorism. If he is accused of such crimes, whether they were committed prior to his taking office or after he left office or while he was in office, he may legitimately be subject to foreign criminal jurisdiction.

Finally, one ought not to pass over in silence one major negative knock-on effect of the Court's judgment. In future cases brought before the International Criminal Court involving states not parties to the Statute, the asserted lack of a customary rule lifting the functional immunity of state officials could be relied upon by such third states. Clearly, the relevant provisions of the Court's Statute removing any immunity only apply to contracting states. Thus, for instance, if the accused is the national of a third state who, acting as a state official, has allegedly perpetrated

¹⁸⁰⁴ ICTY, Appeals Chamber, *Tadic* (*Interlocutory Appeal*), judgment of 2 October 1995, at 32, para. 58.

international crimes on the territory of a state party to the Statute, the third state might argue that under customary international law that state official enjoys functional immunity, hence also immunity from the Court's jurisdiction.

14.9 The Legal Limits of Universal Jurisdiction

Despite all the attention it receives from both its supporters and critics, universal jurisdiction remains one of the more confused doctrines of international law. Indeed, while commentary has focused largely and unevenly on policy and normative arguments either favoring or undercutting the desirability of its exercise, a straightforward legal analysis breaking down critical aspects of this extraordinary form of jurisdiction remains conspicuously missing. Yet universal jurisdiction's increased practice by states calls out for such a clear descriptive understanding. The following Essay will engage this under-treated area. It will offer to explicate a basic, but overlooked, feature of the law of universal jurisdiction: If national courts prosecute on grounds of universal jurisdiction, they must use the international legal definitions-contained in customary international law-of the universal crimes they adjudicate; otherwise, their exercise of universal jurisdiction contradicts the very international law upon which it purports to rely. The Essay will argue that this legal feature derives from the distinctively symbiotic nature of universal prescriptive jurisdiction (the power to apply law to certain persons or things) and universal adjudicative jurisdiction (the power to subject certain persons or things to judicial process). Unlike other bases of jurisdiction in international law, the prescriptive substance of universal jurisdiction authorizes and circumscribes universal adjudicative jurisdiction; in other words, it defines not only the universal crimes themselves, but also the judicial competence for all courts wishing to exercise universal jurisdiction.

The Essay will look to chart out some important implications of this thesis for the real-world practice of universal jurisdiction: It will evaluate how most easily to determine the customary definitions of universal crimes, to detect breaches of international law by courts that manipulate subjectively those definitions, and to enforce against such illicit manipulation. The Essay will contend that while some

definitional aspects invariably remain to be ironed out by state practice, the provisions of widely-ratified and longstanding international treaties provide generally the best record of the core customary definitions of universal crimes, and accordingly, supply not only a harmonized point of departure for courts wishing properly to exercise universal jurisdiction, but also a useful means for detecting breaches of international law by overzealous courts seeking only to exploit universal jurisdiction for purely political or sensationalist ends. The framework presented thus will address concerns that universal jurisdiction hazards unbridled abuse. As the Essay will argue, the law of universal jurisdiction does not; rather, it prescribes legal limits. And the Essay will conclude that in the end, these limits are enforced not by those states exercising universal jurisdiction, but instead by other jurisdictionally interested states—that is, most often by those states whose national citizens are the subject of foreign universal jurisdiction proceedings.

Unlike other bases of jurisdiction in international law, universal jurisdiction requires no territorial or national nexus to the alleged act or actors over which a state legitimately may claim legal authority.¹⁸⁰⁵ Universal jurisdiction instead is based entirely on the commission of certain “universal crimes.”¹⁸⁰⁶ At the present stage of development of international law, this category of crime is generally considered to include piracy, slavery, genocide, crimes against humanity, war crimes, torture, and “perhaps certain acts of terrorism.”¹⁸⁰⁷ It is no secret that the near future may envisage an increased rubric of universal crime that includes, inter alia, human sex trafficking, nuclear arms smuggling, and perhaps other characteristically transnational offenses. A “universal jurisdiction”

¹⁸⁰⁵ See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

¹⁸⁰⁶ See *id.* § 404 cmt. a.

¹⁸⁰⁷ See, e.g., *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987)); see also THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 29 (Stephen Macedo ed., Princeton Univ. 2001) [hereinafter THE PRINCETON PRINCIPLES]; Anthony J. Colangelo, The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes, 36 GEO. J. INT'L L. 537, 578-602 (2005).

attaches to these crimes, so the argument goes,¹⁸⁰⁸ because they are universally condemned and all states have a shared interest in proscribing such crimes and prosecuting their perpetrators.¹⁸⁰⁹ Accordingly, every state has what is called prescriptive jurisdiction, or lawmaking authority,¹⁸¹⁰ to proscribe universal crimes wherever they occur and whomever they involve, and adjudicative jurisdiction to subject the alleged universal criminal to its judicial process.¹⁸¹¹ Thus, if a State A national commits a universal crime against another State A national in State A, all states have jurisdiction to prosecute.

Universal jurisdiction has been the focus of much policy and normative debate: It has been hailed as a catalyst in the global struggle to bring to justice elusive international criminals like tyrants and terrorists, while on the other hand decried as a dangerously pliable tool for hostile states to damage international relations by initiating unfounded proceedings against each other's officials and citizens.¹⁸¹² Such expansive jurisdiction has in fact provoked sharp backlash from many circles-including former and current U.S. administrations.⁸ Yet in the face of some blows to its use,¹⁸¹³ universal jurisdiction is, for the foreseeable future, here to stay. A number of states' courts have in the past year alone

¹⁸⁰⁸ This Essay will not address directly the underlying rationale for universal jurisdiction or its extension to certain crimes, but will accept for present purposes its legal existence as well as the generally acknowledged list of crimes. The focus of the Essay instead will be on clearly marking out some important legal parameters that govern how courts must exercise such jurisdiction under international law.

¹⁸⁰⁹ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. A (1987).

¹⁸¹⁰ *Id.* § 401 (a).

¹⁸¹¹ *Id.* § 401 (b).

¹⁸¹² For a good primer on the debate, compare Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86 (2001), with Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF. 150 (2001). For a progressive, normative restatement of how universal jurisdiction ought to be exercised so as to facilitate its purposes, see THE PRINCETON PRINCIPLES, *supra* note 3.

8. Due to pressure from other nations-principally the United States-Belgium restricted the application of its controversially expansive universal jurisdiction law to require, *inter alia*, more traditional links with Belgium, immunity for foreign governmental officials, and an increased role for the public prosecutor. See Steven R. Ratner, *Editorial Comment, Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 891 (2003).

¹⁸¹³ See Ratner, *supra* note 9; Glenn Frankel, *Belgian War Crimes Law Undone by Its Global Reach*, WASH. POST, Sept. 30, 2003 at AO1.

exercised this type of extraordinary jurisdiction,¹⁸¹⁴ and the recent proliferation of domestic legislation providing for universal jurisdiction¹⁸¹⁵ signals that the trend will only continue.

But despite the heated political controversy that surrounds it, and its increased use by states, a straightforward legal analysis interrogating some basic features of universal jurisdiction remains strangely lacking. This Essay will engage this under-treated area; it will not ask whether and under what circumstances universal jurisdiction might be a good idea, but rather will seek to discern the international law governing how courts must exercise universal jurisdiction when in fact they pursue such exercises, as well as the international legal consequences of improper exercises of universal jurisdiction. My argument therefore will be primarily a legal one, albeit with important policy implications that will contribute to the larger debate since it goes to the very heart of when and how universal jurisdiction can be exercised under international law. The argument will proceed as follows:

It is presently contrary to international law for one state to extend unilaterally its prescriptive jurisdiction into the territory of another state absent some territorial or national link to the matter over which the first state claims competence—for example, where the act has an impact within that state's territory, involves its

¹⁸¹⁴ Spain convicted Argentine naval officer Adolfo Scilingo for “crimes against humanity” based on his participation in a program of throwing political prisoners from airplanes during Argentina’s “dirty war.” Reuters, *Argentine Ex-Officer Convicted in Spain; ‘Dirty War’ Trial First of Its Kind*, WASH. POST, Apr. 20, 2005, at A17; Giles Tremlett, *‘I Don’t Try To Justify Myself’*, GUARDIAN, Apr. 21, 2005, at 6. Spain has also issued warrants for three United States soldiers concerning an incident in which a U.S. tank fired on a Baghdad hotel, killing two journalists. Drew Brown, *Spanish Judge Wants 3 Soldiers Arrested in Journalists’ Deaths*, EATTLE TIMES, Oct. 20, 2005, at A16. One of the journalists killed was not a Spanish national; therefore any charges brought based on his death would rely upon the ground of universal jurisdiction. In Britain, London’s Central Criminal Court recently convicted Afghan warlord Farayadi Sawar Zardad of torture and hostage taking in Afghanistan between 1991 and 1996. Nikki Tait, *UK Court Convicts Afghan Warlord*, FIN. TIMES, July 19, 2005, at 12. Similarly, Dutch courts have brought charges against two former Afghan generals for war crimes and torture committed during the Soviet occupation of Afghanistan in the 1980s. Marlise Simons, *2 Afghans Face Dutch War-Crimes Charges From 80’s Soviet Era*, N.Y. TIMES, Sept. 29, 2005, at A13. Belgium has even resuscitated its “universal jurisdiction law” to grandfather in a case against former Chadian dictator Hissene Habre. Marlise Simons, *Belgium Indicts Chad’s Ex-Leader*, N.Y. TIMES, Sept. 30, 2005, at A8.

¹⁸¹⁵ See *infra* notes 82-86 (listing legislation implementing the Statute of the International Criminal Court and providing for universal jurisdiction).

nationals, or directly threatens its security.¹⁸¹⁶ Thus State B cannot, without such a link, project its domestic laws onto State A and vice versa. Yet, as we have seen, the principle of universal jurisdiction grants all states-including our hypothetical State B-jurisdiction to prosecute universal crimes irrespective of where the crimes occur or which state's nationals are involved (either as perpetrators or victims). This immediately raises the important-but thus far neglected-legal question: What prescriptive jurisdiction prescribes universal crimes? In concrete terms, what prescriptive law must national courts apply when they exercise universal adjudicative jurisdiction?

The answer, this Essay will submit, is international prescriptive jurisdiction, and thus in substance, international law. In other words, while a state's national law may not extend unilaterally its prescriptive reach into the territory of another state, international law can, and does, just that with respect to the proscription on universal crime-only in cases of universal jurisdiction, the adjudication of this international legal prohibition occurs through the operation of national courts. Because the international prescriptive substance of universal crimes authorizes a given court's universal jurisdiction, courts must apply that substance-that is, the international legal definitions of the crimes-when they exercise universal jurisdiction, or else their jurisdictional claim contradicts the very international law upon which it purports to rely. The thesis from which I will build my argument therefore is simply that the exercise of universal adjudicative jurisdiction fundamentally depends upon the application of the legal substance of universal prescriptive jurisdiction, and that this prescriptive substance-the definitions of universal crimes derives from customary international law.

Part II will explain how this thesis brings to light and grounds itself in the uniqueness of universal jurisdiction among the jurisdictional bases generally accepted in international law. For unlike other bases, universal jurisdiction's prescriptive substance at the same time authorizes and circumscribes courts' adjudicative jurisdiction; it defines not only the universal crimes themselves, but

¹⁸¹⁶ See *infra* note 33, and accompanying text, listing bases of jurisdiction.

also the judicial competence for all courts wishing to exercise universal jurisdiction. And it is a prescriptive substance common to all states since it can arise only as a matter of customary law, universally binding on them all. My claim thus will place legal limits on the exercise of universal jurisdiction. It is not just the empowerment of states by international law to adjudicate certain matters under any prescriptive law they see fit. Instead, when national courts prosecute on a theory of universal jurisdiction they must apply the international legal definitions of the crimes they adjudicate, or else their jurisdiction conflicts with international law. Part 1I also will employ this thesis to re-but the claim that because courts typically need some form of domestic authorization to exercise their jurisdiction, universal jurisdiction depends not on international law but on national law.

The thesis raises a number of important questions for the practice of universal jurisdiction that need answering, namely: How are courts to go about determining the definitional substance of what might be dubbed “fuzzy” customary international law? Further, how can states evaluate whether a universal jurisdiction court departs from the customary definition of the crime, thus rendering its underlying jurisdiction contrary to international law? And finally, how can interested states-that is, states on whose territories the universal crimes occurred and/or whose nationals are the subject of universal jurisdiction proceedings-enforce against illegitimate definitional expansions of universal crimes by overzealous courts seeking only to exploit universal jurisdiction for political or sensationalist ends?

In response to these questions, Parts III and IV will offer a basic framework for evaluating the legality of universal jurisdiction exercises under this Essay's thesis. In response to the first question-how to determine the customary definitions of universal crimes-Part III will look to the formation of customary law generally, and will maintain that as to universal crimes in particular, their core substantive elements are set forth quite explicitly in the various treaties and conventions prohibiting the crimes under positive international law. I will not argue that treaty law sets forth definitively the customary definitions of universal crimes, but rather the best evidence of what those definitions are. While the

contention that treaties may generate customary law is perhaps not entirely free from debate with respect to, for example, the formation of “instant custom” at the moment the treaty enters into force absent opportunity for subsequent international acceptance of or acquiescence in the rules contained therein, or the establishment of custom through only bilateral treaties, I need not go so far for my argument. The treaties proscribing the various universal crimes represent a relatively longstanding consensus not only as to the prohibition on those crimes, but also- necessarily-as to their substance. On this point, the Appendix to this Essay will critically survey the positive law relating to each of the universal crimes listed above and assay some of the more important definitional provisions which supply a harmonized prescriptive foundation for courts wishing to exercise universal jurisdiction.¹⁸¹⁷ My purpose in so doing is not to elaborate comprehensively all aspects of the definitions of universal crimes under customary law, but rather to provide courts and international lawyers with a useful point of departure in line with the analytical framework forwarded by this Essay. To be sure, although state practice and opinion juris (the two elements that make up customary law) continue to fill in, refine and modify aspects of these customary definitions, for present purposes courts have a clear and workable catalog of core definitions handy, in the form of treaty provisions and legislation transposing those provisions onto domestic law, with which to prosecute universal crimes. In fact, national legislation enabling universal jurisdiction characteristically draws from treaty law to define the relevant offense¹⁸¹⁸ and courts consequently use that substantive definition to prosecute universal crimes,¹⁸¹⁹ thus reinforcing custom in this respect. Next, because treaty provisions largely evidence the core definitions of universal crimes, we might respond to the second question-how to determine when universal jurisdiction courts deviate from the customary definitions of the crimes-by saying initially that there are “easy cases” and “hard cases.” Where a court claiming universal jurisdiction clearly departs from the subject crime's core definition-as

¹⁸¹⁷ See Appendix, *infra*. As the Appendix bears out, the treaties themselves tend to avow either an explicit or implicit purpose to codify or create custom in their respective areas of international lawmaking.

¹⁸¹⁸ See *infra* notes 82-86.

¹⁸¹⁹ See *infra* text accompanying notes 104-16.

evidenced by the treaty-absent a showing that customary law has evolved to justify such a departure, the illegitimacy of its jurisdictional claim is easily identifiable. Especially subject to easy-case categorization are universal crimes with rule-based elements. A quick example here, and one that will be discussed in more detail below,¹⁸²⁰ is the Spanish Audiencia Nacional's illegitimate expansion of the victim classes in the definition of genocide to include political groups, which purported to justify the court's assertion of universal jurisdiction over former Chilean dictator Augusto Pinochet.¹⁸²¹ Under this Essay's framework, had the case gone forward on these grounds,¹⁸²² Chile-both the territorial and national state-would have had a powerful legal claim to reject Spanish jurisdiction since the definition the court employed was plainly exorbitant. But although treaties strongly evidence the core elements of universal crimes, there invariably will be aspects of the definitions that need to be ironed out further by state practice. Thus, objections to universal jurisdiction that are not based on a court's clear departure from the universal crime's core substantive definition-as evidenced by the treaty-might fall into the "hard case" category. Especially subject to hard-case classification are crimes that depend on the application of standards. Examples here might include whether a specific act constitutes a war crime under standards of target selection and proportionality contained in the Geneva Conventions and their Additional Protocols,¹⁸²³ or whether a particular interrogation technique constitutes torture under the Torture Convention's widely-accepted definition of the crime.¹⁸²⁴ The jurisprudence of

¹⁸²⁰ See *infra* text accompanying notes 104-16.

¹⁸²¹ See *infra* text accompanying notes 104-06.

¹⁸²² Torture ended up being the relevant crime of extradition for Great Britain, though Pinochet ultimately was not extradited but sent back to Chile because he was determined medically unfit to stand trial. See *Regina v. Bow St. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1999] No. 3, 2 W.L.R. 827, 833-36 (opinion of Lord Browne-Wilkinson), reprinted in part in *THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN* 255, 268 (Reed Brody & Michael Ratner, eds., 2000) (hereinafter *THE PINOCHET PAPERS*).

¹⁸²³ I have argued against the use of universal jurisdiction over war crimes generally for this reason. See Appendix E, *infra*; Colangelo, *supra* note 3, at 587-94 (observing that these standards afford courts too much latitude to allege war crimes against U.S. forces despite an unprecedented adherence to international humanitarian law in the NATO bombing in the former Yugoslavia and the 2003 invasion of Iraq).

¹⁸²⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 1, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter

international criminal tribunals and of national courts exercising universal jurisdiction-decisions which are not precedent on their own but nonetheless evidence state practice,¹⁸²⁵ would be particularly helpful guides here. But in order to illustrate most simply its basic thesis, this Essay admittedly concerns itself more with the easy cases-though the hard cases undoubtedly supply fertile ground for further legal evaluation of universal jurisdiction assertions in line with the framework forwarded here. Indeed, and as Part IV indicates in its enforcement discussion, where territorial and national states-states that have a strong legal interest in a given universal jurisdiction assertion-object to the definition of the crime that purports to justify another state's universal jurisdiction claim, the resolution of that international legal clash will go far toward determining further the customary definition of the crime at issue.

Finally, Part IV will deal with the question of enforcement against a court's illegitimate definitional expansion of a universal crime upon which the court purports to base its jurisdiction. Part IV will explain that the international legal limits of universal jurisdiction are indeed enforceable against such courts, and that the enforcers are those states with concurrent jurisdiction over the alleged crimes-that is, states with territorial or national jurisdiction. As I will show, where jurisdictionally interested states reject an illegitimate universal jurisdiction claim stemming from an improper manipulation of the underlying crime's definition, international law considers the universal jurisdiction claim an enduring breach. In short, it is not the state exercising universal jurisdiction, but most often those states whose nationals are in the dock, that are the enforcers of the legal limits of universal jurisdiction.

Torture Convention]; see also *infra* Appendix F (for example, the phrase “severe pain or suffering” is particularly open to interpretation).

¹⁸²⁵ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. a, b (1987).

14.9.1 Universal Jurisdiction's Prescriptive Adjudicative Symbiosis

Jurisdiction is the central concept in the interface between the nation state and international law; as such, it describes the power allocation both among individual states and between states and international law. A state's jurisdiction, or what some may call “sovereignty,”¹⁸²⁶ refers by and large to its authority to make, apply, and enforce law. More distinctly, a state's prescriptive jurisdiction is its authority to apply its law to certain persons or things,¹⁸²⁷ and its adjudicative jurisdiction is its authority to subject persons or things to its judicial process.¹⁸²⁸ Importantly, “[j]urisdiction to enforce or adjudicate is dependent on jurisdiction to prescribe.”¹⁸²⁹ Thus a state has no inherent authority to subject persons or things to its judicial process if that state has no lawmaking authority over those persons or things to begin with.¹⁸³⁰

¹⁸²⁶ Although notoriously opaque, the label “sovereignty” invokes the familiar definition of state power by implying the state's autonomous jurisdictional authority to create, implement, and enforce its own laws; in short, it provides a metric by which changes in a given power dynamic- for purposes of the present discussion, that between the state and international law-may be measured. See Marcel Brus, *Bridging the Gap between State Sovereignty and International Governance: The Authority of Law*, in *STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE* 7-10 (Gerard Kreijen, ed. Oxford 2004). See generally John H. Jackson, *Sovereignty Modern: A New Approach To An Outdated Concept*, 97 AM. J. INT'L L. 782, 786, 789-90 (2003). For a discussion of the evolution of the concept of sovereignty toward a human rights-based, popular sovereignty see W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990).

¹⁸²⁷ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987).

¹⁸²⁸ *Id.* § 401(b).

¹⁸²⁹ CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 132 (2001); RESTATEMENT § 431 cmt. a.

¹⁸³⁰ States may, however, agree either formally or informally to delegate among themselves jurisdiction absent territorial or national prescriptive authority-but such an exercise of jurisdiction is only legitimate insofar as it stems from the delegation of jurisdiction by a state with territorial or national prescriptive authority. For example, there is a form of extraterritorial criminal jurisdiction exercised by some European states, in particular Germany, called the “vicarious administration of justice” or “representation” principle which allows for the application of municipal criminal law based only on the custody of a foreign defendant without other territorial or national links. This type of jurisdiction is, however, preconditioned upon “a request from another state to take over criminal proceedings, or either the refusal of an extradition request from another state and its willingness to prosecute or confirmation from another state that it will not request extradition.” *Extra-territorial Criminal Jurisdiction*, in *COUNCIL OF EUROPE, EUROPEAN COMMITTEE ON CRIME PROBLEMS* 14 (1990). Unlike universal jurisdiction, the representation principle conforms with the classical sovereignty model under which states have full prescriptive authority

The international law of jurisdiction is a customary law. That is, it is not based on treaties or other positive agreements among states, but rather on state practice and opinion juris, or the state's belief or intent that it is acting with legal purpose¹⁸³¹ (though by these two components, as I show in more detail below, treaties certainly may inform or evidence the customary law of jurisdiction).¹⁸³² While all states may contribute to international custom since it embodies their collective “general practice accepted as law,”¹⁸³³ custom is an external force on each individual state that makes up part of the international law-making collective.¹⁸³⁴ The legal construct of jurisdiction essentially comprises the package of “external rules that have defined [the nation] as a

regarding conduct within their territories. First, the principle requires some form of agreement or consent between the custodial prosecuting state and the territorial state. See *id.*

([T]he ‘representation’ principle differs from the principle of universality in that the decision to prosecute is not taken in isolation by the state claiming jurisdiction, but requires a certain understanding, if not agreement, by the other state which is more directly concerned, for instance the state where the offence has been committed.).

Hence, the territorial state permits the custodial state's application of prescriptive jurisdiction, which of course the territorial state has a sovereign prerogative to delegate. Also in this connection, the principle is decidedly subordinate to other principles of jurisdiction, which take priority. See Jurgen Meyer, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction*, 31 HARV. INT'L. L.J. 108, 116 (1990). Second, the substantive crime must be virtually indistinguishable as between the custodial and territorial states; the custodial state literally acts as a surrogate for the territorial state. See *id.* at 111

([T]he principle of the vicarious administration of justice... implies that it is insufficient to find an applicable norm of the place of conduct which is identical to the [custodial state's] norm; the particular conduct must also satisfy the elements of that norm. Moreover, the grounds of justification and excuse under the law of the place of conduct must be observed....);

see also COUNCIL OF EUROPE, *supra* at 14. In contrast, universal jurisdiction can be exercised irrespective of the permission and despite the prescriptive legislation of the territorial state.

¹⁸³¹ See e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (describing this component as “a sense of legal obligation”); Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1153, 1179 (describing this component as “accepted as law”).

¹⁸³² See discussion *infra* note 46.

¹⁸³³ Statute of the International Court of Justice, *supra* note 28, at art. 38.

¹⁸³⁴ In a recent defense of customary law, George Norman and Joel Trachtman explain this phenomenon in the following manner: while custom is “endogenous to states as a group meaning that it is not a vertical structure produced outside or above the group of states—it has an independent, exogenous influence on the behavior of each individual state.” George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 542 (2005).

'nation.'"¹⁸³⁵ Presently those rules circumscribe the prescriptive reach of states based principally on their authority over territory and national citizens. Traditional bases therefore hold that a state has jurisdiction over acts that occur-even in part-within its territory (subjective territoriality), may not occur but have an effect within its territory (objective territoriality), involve its national citizens (active and passive personality-based on perpetrator and victim respectively), and are directed against its security (protective principle).¹⁸³⁶ Despite an observable allowance for concurrent jurisdiction by multiple states, e.g., a matter occurs (or has an effect) in the territory of one state but involves one or more nationals of another state, and even conflicts between states with concurrent jurisdiction,¹⁸³⁷ the jurisdictional construct provides a relatively practicable and objective measure of the authority of individual states vis-à-vis one another concerning a particular matter. Thus State B may apply its prescriptive jurisdiction to persons and things within its territory, and therefore may apply its jurisdiction to a State A national within State B borders. State B may even have a jurisdictional claim over a State B national who happens to be in State A. But absent some justifying territorial or national nexus (or agreement between the states),¹⁸³⁸ State B may not project unilaterally its domestic laws onto State A. For instance State B may not project unilaterally, say, its traffic codes, onto State A. That issue is squarely

¹⁸³⁵ Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1113 (1982) [hereinafter D'Amato, *The Concept of Human Rights*]; Anthony D'Amato, *Is International Law Really "Law"?* 79 NW. U. L. REV. 1293, 1308 (1985)

(As a construct of international law, a nation is nothing more nor less than a bundle of entitlements, of which the most important ones define and secure its boundaries on a map, while others define its jurisdictional competency and the rights of its citizens when they travel outside its borders.).

¹⁸³⁶ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); see also Anne-Marie Slaughter, *Defining the Limit: Universal Jurisdiction and National Courts*, in *UNIVERSAL JURISDICTION* 168, 172 (Stephen Macedo, ed., 2004) (noting that like territorial and national bases of jurisdiction, this protective principle is "defined in terms of [a state's] territorial integrity or the safety of its citizens.").

¹⁸³⁷ See, e.g., *Case of S.S. Lotus (Fr. V. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 30-31 (Sept. 7) (ruling on the collision of a French ship with a Turkish ship, and observing that [n]either the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.).

¹⁸³⁸ See *supra* note 27.

within State A's sovereign jurisdiction.¹⁸³⁹ It follows that State B's courts cannot apply State B's traffic code to a State A driver, driving only in State A, and with no other jurisdictional connection to State B since there exists no prescriptive jurisdiction upon which State B's adjudicative jurisdiction may rely. It would be as if some British court applied the British rule that drivers must drive on the left side of the road to a U.S. citizen, driving only in the United States and with absolutely no connection to Britain. Such an application plainly would clash with international law.

Yet universal jurisdiction allows State B's courts adjudicative authority with respect to an act that occurs entirely within State A's borders, has no effect on the territory of State B, and involves only State A national citizens. If, as we have said, State B cannot extend its prescriptive jurisdiction into the territory of State A, universal jurisdiction begs the question of what prescriptive jurisdiction authorizes State B's courts. In cases of universal jurisdiction that prescriptive jurisdiction is, as a legal matter, international-for as we have seen already, extraterritorial prescriptive jurisdiction of this sort cannot by law be national, e.g., State B may not apply unilaterally its municipal law concerning traffic codes to State A nationals acting with respect to other State A nationals in State A. Universal crimes are instead proscribed at the level of international law which, unlike national prescriptive jurisdiction, does extend into the territory of all states.

Universal jurisdiction is therefore quite unique among the bases of international jurisdiction in two discrete but related respects. First, its prescriptive and adjudicative faces are distinctively symbiotic: The prescriptive substance of universal crimes not only defines the crimes themselves, but also authorizes the adjudicative competence for all states engendered by the commission of those crimes. In other words, universal adjudicative jurisdiction depends upon the definitional substance of the crime as prescribed by universal prescriptive jurisdiction.

¹⁸³⁹ Indeed, it is difficult to imagine a scenario in which, even with a link to the conduct in question, one state's prescriptive jurisdiction regarding traffic codes could justifiably extend into the territory of another state.

Second, the legal content of this prescriptive jurisdiction is moored in customary international law. By contrast, a state's jurisdiction over its territory or nationals-while certainly a matter of international law at the edges since it describes the state's authority vis-à-vis other states-is not, at the level of a state's domestic law, necessarily substantiated by the content of international law. International law merely sets the perimeters inside which states have sovereign lawmaking authority (to the extent that they do not legislatively act contrary to international law-by endorsing universal crimes).¹⁸⁴⁰ It follows that states may grant their courts jurisdiction over any subject matter they please within these territorial and national prescriptive perimeters. The same cannot be said of universal jurisdiction-courts' subject matter jurisdiction is circumscribed by the prescriptive substance of the international law outlawing universal crimes. Hence if certain State A nationals put into action a program of extermination of other State A nationals based on the latter group's race or ethnic identity, courts in State B would have the authority, under international law, to prosecute the former group for the universal crime of genocide. But crucially, State B's adjudicative jurisdiction would be contingent upon the customary definitional substance of the crime prosecuted, i.e., genocide. Put differently, absent territorial or national links or some other legitimating understanding between the states, State B could not prosecute the State A actors under its municipal code for a series of homicides; like our traffic code hypothetical, such an application would conflict with international law. In sum, a state's universal adjudicative jurisdiction is empowered not by the state's own domestic prescriptive authority-based on, for instance, its authority over national territory or citizens-but rather, by international law. Consequently, when states exercise universal jurisdiction they are legally constrained to adjudicate the prescriptive substance of the crime under international law.

¹⁸⁴⁰ A question arises where the state, through government power, commits universal crimes on a grand scale. Such a state arguably has waived its jurisdiction under international law. For example, it has been suggested that "[a] State that massively violates the rights of an ethnic minority risks forfeiture of its rights to control a given part of its territory." Brus, *supra* note 23, at 13.

The objection immediately will be made, however, that national courts typically have no authority to pull *sua sponte* from the sky principles of international law according to which they may then adjudicate a matter; instead they must rely upon some domestic law granting them jurisdiction. And thus, the very idea of international prescriptive jurisdiction depends entirely on domestic law. It follows, the argument goes, that (contrary to my stated position) the state court that asserts universal jurisdiction gets its authority not from international law but from that state's domestic legislation. References to what skeptics might sardonically label "so-called international law" may make for nice and popular dicta in the court's opinion, but as a matter of law they are utterly irrelevant.

This position misunderstands the international law of jurisdiction. The principle of universal jurisdiction empowers states in the first instance with the capacity to adjudicate certain matters where they otherwise would have no authority to do so. How the sovereign state then authorizes its own judicial bodies to adjudicate the matter is up to the state's domestic law (and thus courts are not randomly pulling from the sky international law). For instance, the domestic law of the state may indeed permit the court to draw directly from international law, or domestic law may incorporate or reflect international law,¹⁸⁴¹ in which case the state would be using its domestic laws and procedures to adjudicate the substance of international law. But importantly, for cases of universal jurisdiction the substance

¹⁸⁴¹ These two approaches to international law by national legal systems are called monism and dualism respectively. Under the monist approach to international law

[t]he state's constitutional system must recognize the supremacy of international law. The national legislature is bound-constitutionally bound to respect international law in enacting legislation. The national executive is constitutionally required to take care that international law be faithfully executed, even in the face of inconsistent domestic law. The national judiciary must give effect to international law, notwithstanding inconsistent domestic law, even domestic law of a constitutional character.

Louis HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 64 (Dordrecht 1995). Dualism, on the other hand, views international law as the law between sovereign states, a law that is separate and apart from domestic law. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 30 (1990). Thus, for international law to be part of a dualist state's domestic legal system, it must be implemented through domestic legislation. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 107 (1991). Most states incorporate aspects of both approaches with regard to the domestic application of international law.

of the law must accord with the prescriptive jurisdiction that governs it-that is, it must be international.

14.9.2 The Customary Law of Universal Jurisdiction

If state courts' universal adjudicative jurisdiction depends upon universal prescriptive jurisdiction as defined by international law, then our next question asks how to determine the content of this prescriptive jurisdiction, or the customary definitions of universal crimes. This Part contends that the answer lies in the provisions of the widely-ratified and relatively longstanding multilateral treaties proscribing universal crimes under positive international law. To frame my argument, I begin with two distinctions. The first elaborates upon the distinction between the more procedural law of universal adjudicative jurisdiction and the more substantive law of universal prescriptive jurisdiction. The second, to be clear about the customary character of universal jurisdiction, observes the difference between a treaty-based or "conventional" version of universal jurisdiction, which necessarily confines itself to the states party to the convention that generates such jurisdiction, and the customary law of universal jurisdiction, which extends to all states. I then explain how treaty provisions prescribing universal crimes provide a strong and easily-measurable record of customary law's universal prescription as to those crimes-in other words, the prescriptive jurisdiction that governs state courts' exercises of universal adjudicative jurisdiction.

A. Adjudicative Versus Prescriptive Universal Jurisdiction

Although universal adjudicative jurisdiction depends upon the substance of universal prescriptive jurisdiction (or conversely, the substance of universal prescriptive jurisdiction authorizes universal adjudicative jurisdiction), the customary rules of universal adjudicative and prescriptive jurisdiction are nonetheless distinct in their character and development. Universal adjudicative jurisdiction essentially outlines the procedural connection needed for courts to assert jurisdiction over the person(s) before it. For universal jurisdiction

purposes, this procedural element exceptionally requires no territorial or national nexus to the accused criminal over which a court asserts judicial authority.¹⁸⁴²

My focus here, however, is on universal prescriptive jurisdiction, which relates more to the subject matter over which the court claims competence—that is, the substance of universal crime itself. Due perhaps to a need for legal analysis explaining an increased exercise in the last decade or so of jurisdiction by courts having no territorial or national links to the defendants they seek to prosecute,¹⁸⁴³ commentary has concentrated unevenly on the unqualified, and literally global ambit of universal adjudicative jurisdiction,¹⁸⁴⁴ while important aspects of the prescriptive scope and definition of universal crimes themselves have been overlooked. To illustrate, piracy is commonly understood as a core universal crime because throughout international legal history any state's courts could prosecute the pirate absent territorial or national links to him or his piratical acts, and more recently, such adjudicative procedure has been strongly endorsed in conventional law.¹⁸⁴⁵ But the question of what precisely “piracy” is as a matter of customary law has garnered little attention¹⁸⁴⁶—and yet, as we

¹⁸⁴² The conventional or positive law relating to this aspect of jurisdiction is found in treaty provisions establishing states parties' jurisdiction to prosecute, i.e., the provisions determining whether states may exercise jurisdiction over acts committed outside their territories, having no effect on their territories and involving non-nationals. See, e.g., the Torture Convention's prosecute-or-extradite provisions set forth *infra*, note 52.

¹⁸⁴³ See LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 1 (2003) (noting that “[m]ore cases of 'universal jurisdiction' have been reported in the past decade than throughout the whole history of modern international law.”).

¹⁸⁴⁴ Commentary has tended to focus almost exclusively on the availability of universal jurisdiction for courts—i.e., adjudicative jurisdiction, without discussing the substance of the crime itself—i.e., prescriptive jurisdiction. See, e.g., *THE PRINCETON PRINCIPLES*, *supra* note 3, at 21–25 (listing various universal crimes but not explaining how to define them and dealing largely with procedural issues such as due process, extradition, evidence-gathering, immunities, statutes of limitations, amnesties, resolution of competing jurisdictions, double jeopardy, and settlement of disputes between states with concurrent jurisdictional claims). The author has found one article that discusses universal jurisdiction as a prescriptive jurisdiction, but only to make the point that while a state's universal prescriptive jurisdiction is extraterritorial, jurisdiction to enforce is territorial. See Roger O'Keefe, *Universal Jurisdiction - Clarifying the Basic Concept*, 2 *J. INT'L CRIM. JUST.* 735 (2004) (dealing primarily with the ICJ opinion in the Arrest Warrant case, and not discussing the nature of the prescriptive jurisdiction under the universality principle, the main focus of this Essay).

¹⁸⁴⁵ M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in *UNIVERSAL JURISDICTION* 47–48 (Stephen Macedo ed., 2004).

have seen, this customary definition determines the legal availability of a given court's universal subject matter jurisdiction. To take a more modern and contentious example, "terrorism" has been rejected by courts as a crime of universal jurisdiction. The reason for this rejection stems not from a void of state practice favoring far-reaching adjudicative jurisdiction over the perpetrators of this type of crime, but rather from the absence of a coherent customary definition of "terrorism."¹⁸⁴⁷ In the words of the United States Court of Appeals for the Second Circuit in the recent *Yousef* opinion:

Unlike those offenses supporting universal jurisdiction under customary international law—that is, piracy, war crimes, and crimes against humanity—that now have fairly precise definitions and that have achieved universal condemnation, 'terrorism' is a term as loosely deployed as it is powerfully charged.... No consensus has developed on how to properly define 'terrorism' generally....[Such] strenuous disagreement among States about what actions do or do not constitute terrorism... [means that] terrorism unlike piracy, war crimes, and crimes against humanity—does not provide a basis for universal jurisdiction.¹⁸⁴⁸

Thus the answer to the question of how to determine the customary definitional content of universal crimes is of increasing legal and practical importance.

On my view, developed below, that the answer lies in the substantive definitions of treaties, the international crime at issue in *Yousef*, which involved planting and exploding a bomb on a civilian aircraft—not abstractly "terrorism"—clearly would be subject to universal jurisdiction. The relevant international instrument, the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the

¹⁸⁴⁶ For an historical account of the crime that highlights confusion about what set piracy apart from other actions on the high seas, see Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 *HARV. INT'L L.J.* 183 (2004).

¹⁸⁴⁷ *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003).

¹⁸⁴⁸ *Id.* at 87-89 (internal citation and quotation omitted).

Safety of Civil Aviation, not only evidences a custom of universal adjudicative jurisdiction by providing for extraterritorial and extra-national jurisdiction over alleged plane-bombers,¹⁸⁴⁹ it fills the prescriptive customary hole that so worried the Second Circuit by prescribing a definite international law articulation of the crime of plane-bombing.¹⁸⁵⁰ Thus while “terrorism” abstractly labeled may not be

¹⁸⁴⁹ Article 5 of the Montreal Convention provides that:

Each Contracting State shall...take such measures as may be necessary to establish its jurisdiction over the offences [defined]...in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

Article 7 states:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177, 181-82 [hereinafter Montreal Convention]. For a discussion of how these provisions evidence custom, see Colangelo, *supra* note 3, at 598:

A state's entrance into a treaty with other states and commitment to be bound thereby constitutes the maximal expression of state sovereignty and “assent” to the particular rules contained in that treaty; the state's implementing legislation pursuant to the treaty compounds this assent by demonstrating a “general usage and practice” designed to enforce those rules; and finally, “the [state's] judicial decisions recognize and enforce that law” in practice.

The Montreal Convention, which was put into effect in 1971, currently has 173 states parties, which means that in the last thirty years the vast majority of states in the world have agreed to bind themselves to and put into practice through domestic legislation and judicial enforcement the provisions of the treaty. [And while] the Montreal Convention “creates a basis for the assertion of jurisdiction that is moored in a process of formal law making and that is binding only on the States that accede to it[.]”... it is precisely this process of formal lawmaking between sovereign states, their mutual assent to the rule agreed upon, and their affirmative adoption and implementation of this rule in domestic legislation and judicial decision making that constitutes evidence of the customary rule. What is important to keep in mind is that the treaty, the municipal legislation, and the judicial opinion are not themselves customary international law; rather they make up the absolute best evidence of what a state, the United States, and all other states party to the Montreal Convention consider to be a legally binding practice-and in this respect supply the most powerful evidence possible of customary international law there is. (internal citation omitted) (emphasis in original).

¹⁸⁵⁰ Article 1 of the Montreal Convention defines the offense as:

unlawfully and intentionally...plac[ing] or caus[ing] to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight....

Montreal Convention, *supra* note 46, at art. 1

subject to universal jurisdiction because of its definitional uncertainty, certain clearly-defined acts of terrorism, like plane bombing, are.¹⁸⁵¹

B. “Conventional” Versus Customary Universal Jurisdiction

But treaties and custom are of course essentially different types of law. And like all bases of jurisdiction in international law, “[u]niversal jurisdiction is a fundamentally customary, not treaty-based, law.”¹⁸⁵² So before we make the jump from treaty definitions to customary definitions, one more distinction should be made between what might be called treaty-based or “conventional” universal jurisdiction on the one hand, and customary universal jurisdiction on the other. So-called “conventional” universal jurisdiction is somewhat of an oxymoron, or at the least, a misnomer. Because such jurisdiction is rooted in treaty law, it provides neither in fact, nor in law, a truly “universal” jurisdiction.¹⁸⁵³ It merely vests a comprehensive jurisdiction for states party to a convention *inter se* with respect to the prosecution of a crime that is the subject of the convention; states party may (and in some cases are obliged to) under the jurisdictional provisions of the convention--exercise their adjudicative jurisdiction absent territorial or national links to the offense that the convention prescriptively defines and outlaws. Though the convention's prescriptive mandate-i.e., the proscription on the crime ostensibly binds all states party all the time, conventions tend to limit procedurally the exercise of a state courts' adjudicative jurisdiction, absent territorial or national links to the crime, to instances where the alleged offender is afterwards present or “found” in that state party's territory and it does not extradite him to another state party.¹⁸⁵⁴

¹⁸⁵¹ Colangelo, *supra* note 3, at 594-603

¹⁸⁵² *Id.* at 567; see also *Yousef* 327 F.3d at 96 n.29

¹⁸⁵³ See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 64 (1994) (explaining that treaty-based jurisdiction is never “universal jurisdiction *stricto sensu*” because such jurisdiction concerns only the states parties to the treaty).

¹⁸⁵⁴ This provision is commonly referred to as a “prosecute-or-extradite” provision, or *aut dedere aut judicare*.

To illustrate, the Torture Convention prescriptively defines and bans the crime of torture for states party to the Convention.¹⁸⁵⁵ And through its prosecute-or-extradite provisions,¹⁸⁵⁶ the Convention provides for an equivalent of universal adjudicative jurisdiction over torture as among the states party. As a matter of positive law, however, both the Convention's prescriptive ban on torture and its grant of extraterritorial and extra-national adjudicative capacity to courts to prosecute torturers comprehend only the jurisdictions of those states party to the Convention.¹⁸⁵⁷ In other words, the Torture Convention does not, on its own, bind non parties.

By contrast, the customary basis of universal jurisdiction over torture, both in terms of its prescriptive ban on the crime and in terms of its adjudicative scope allowing all states' courts to prosecute the crime, extends beyond those states party to the Torture Convention to contemplate the jurisdiction of all states-making jurisdiction in fact, and in law, "universal." So if State A and State B are parties to the Torture Convention, and State B asserts jurisdiction pursuant to the Convention over a State A national found in State B for torture committed in State A against other State A nationals, State B is not exercising universal

¹⁸⁵⁵ Torture Convention, *supra* note 21, at 197; see also Appendix F, *infra*.

¹⁸⁵⁶ Torture Convention, *supra* note 21, at 198. Article 5(2) of the convention provides that "[e]ach State Party shall...take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him...." And Article 7(1) provides:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in [the relevant provision] is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Id. at 198.

Lori Damrosch has noted that "at a minimum all the prosecute-or-extradite crimes [like torture] are ones as to which there is an option to exercise jurisdiction without any link to the crime other than custody of the offender." Lori F. Damrosch, *Connecting the Threads in the Fabric of International Law*, in *UNIVERSAL JURISDICTION* 91, *supra* note 33, at 94 (emphasis in original).

¹⁸⁵⁷ For instance, Article 34 of the Vienna Convention on the Law of Treaties provides that "[a] Treaty does not create either obligations or rights for a third State without its consent," and Article 35 provides that treaties are only binding on non-parties where the non-party "State expressly accepts that obligation in writing." Vienna Convention on the Law of Treaties, May 23, 1969, arts. 34 & 35, 1155 U.N.T.S. 331, 333, 8 I.L.M. 679 (entered into force Jan. 27, 1980).

jurisdiction, but is simply discharging its treaty obligations.¹⁸⁵⁸ Similarly, in *Yousef*, while the Second Circuit found that it did not have universal jurisdiction as a matter of customary law, it did find jurisdiction under the Montreal Convention and its domestic implementing legislation with respect to acts committed by a Pakistani national, which killed and injured Japanese nationals on a Philippine flag airliner flying from the Philippines to Japan (there was no evidence that a U.S. citizen was even aboard the flight).¹⁸⁵⁹ Critically, in the Torture Convention hypothetical, and in *Yousef*, both the prosecuting and the territorial states were parties to the applicable conventions¹⁸⁶⁰ and the prosecuting states used the prescriptive definitions of the crimes contained in the conventions.¹⁸⁶¹

To place the jurisdictional competence of the prosecuting state in the torture hypothetical outside of that vested by the treaty, we would need to make either State A (the territorial state), or State B (the prosecuting state), or both, non-parties to the Convention. Plainly if either both State A and State B are non-parties, or just State B is a non-party, State B cannot pretend to assert jurisdiction based on a treaty to which it is not party, and which accordingly does not vest it with jurisdiction. But what about the scenario in which State B is a party to the Convention and State A is not? Can State B still prosecute a State A national for torture committed in State A against only State A nationals based on

¹⁸⁵⁸ This was essentially the reasoning of Lord Browne-Wilkinson speaking for the English House of Lords in *Pinochet III*, where he concluded that Pinochet could be extradited to Spain under the Torture Convention since

the states with the most obvious jurisdiction... do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction Since Chile, Spain and the United Kingdom are all parties to the Convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation.

THE PINOCHET PAPERS, *supra* note 19. The Netherlands also recently convicted a torturer absent territorial or national links to his crimes which occurred in the former Zaire (now Democratic Republic of the Congo) based on the Dutch implementation of the Torture Convention's provisions.

See 51 NETH. INT'L L. REV. 439, 444-49 (2004).

¹⁸⁵⁹ *Yousef* 327 F.3d at 97, 108-10.

¹⁸⁶⁰ *Id.* at 109 n.43.

¹⁸⁶¹ *Id.* at 110 (observing that the domestic implementing legislation "carefully tracks the text of the Montreal Convention"). As to the definition of the crime in particular, the Montreal Convention and 18 U.S.C. § 32(b)(3) define the crime in substantively identical terms, see *infra* note 69.

the positive law of the Torture Convention? The answer would seem to be no, and the reason is that the Torture Convention, by itself, does not extend its prescriptive jurisdiction outlawing torture into the territory of non parties, i.e., State A. And therefore, State B, acting pursuant only to the Convention, would have no positive prescriptive jurisdiction authorizing its adjudicative jurisdiction under the Convention.

The State B prosecution could, however, rely on the customary law of universal jurisdiction because its prescriptive jurisdiction does extend into the territory of all states to proscribe torture, and likewise vests all states with the adjudicative jurisdiction to prosecute the torturer. But State B's customary adjudicative jurisdiction would only be valid insofar as it accords with the governing customary prescriptive jurisdiction. And so we come back to the question of how to determine the prescriptive substance of universal crimes under customary law.

C. Treaties and the Prescriptive Substance of Universal Crimes

As we have seen, unlike treaties and other positive law instruments that affect only those states that have signed onto them through a formal international lawmaking process, customary law is universal in its application. Moreover, it is evidenced by and evolves organically in light of state practice conditioned by *opinio juris*. Such practice is manifest, for instance, in the state's entrance into a treaty. The idea that generalizable or "norm-creating" treaty provisions-like, for example, proscriptions on internationally agreed-upon crimes-generate customary law is not new¹⁸⁶² and is, in the words of the International Court of Justice, "indeed one of the recognized methods by which new rules of customary

¹⁸⁶² Professor D'Amato first made the argument over forty years ago in his article *Treaties as a Source of General Rules of International Law*, 3 HARV. INT'L L.J. 1 (1962); see also ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 105-66 (1971) [hereinafter D'AMATO, *THE CONCEPT OF CUSTOM*]; see also D'Amato, *The Concept of Human Rights*, *supra* note 32 at 1127-47. See generally Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988); Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1996).

international law may be formed.”¹⁸⁶³ Although some might feel the need to temper the formation of custom through treaty by requiring a certain threshold number of states party to the treaty or the passage of a certain amount of time before its provisions could constitute custom,¹⁸⁶⁴ this Essay needs not go so far for its argument. Each of the treaties prohibiting universal crimes enjoys longstanding and widespread acceptance; indeed, and as the Appendix bears out, the treaties themselves even tend to avow either an explicit or implicit purpose to codify or create custom in their respective areas of international lawmaking.¹⁸⁶⁵ That treaties do so is, again, nothing new for international law. The Nuremberg Tribunal, for instance, applied to the accused Nazi war criminals before it, as a matter of customary law, the detailed provisions of the 1907 Hague Convention and the 1929 Geneva Convention on the Prisoners of War.¹⁸⁶⁶ The Tribunal, citing no state practice other than that of states agreeing upon the rules contained in, and entering into, these treaties, observed that the rules were “declaratory of the laws and customs of war.”¹⁸⁶⁷ As Anthony D’Amato points out, “[i]t strains credulity to suppose that state practice had become so detailed by 1939—particularly between 1929, the date of the Geneva Convention, and 1939!—that the conventions were merely ‘declaratory’ of such practice. Rather, the more reasonable interpretation is that the conventions ‘declared’ what the

¹⁸⁶³ North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987) (“International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”).

¹⁸⁶⁴ See generally Scott & Carr, *supra* note 59.

¹⁸⁶⁵ See Appendix, *infra*. The express or implied avowal of generating custom, when buttressed by the history of actions and reactions of states in respect to these treaties, would seem to take care of Dr. Michael Akehurst’s concerns that *opinio juris* must accompany a treaty for its provisions to create custom; the ways in which he sees this criterion satisfied are a declaratory statement in the treaty or its preparatory materials to this effect, or by subsequent practice and *opinion juris* supporting the rule. Michael Akehurst, Custom as a Source of International Law, in THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1974-1975 1, 45, 49 (R.Y. Jennings & Ian Brownlie eds., 1977).

¹⁸⁶⁶ International Military Tribunal Judgment, in NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 83 (1947).

¹⁸⁶⁷ *Id.*

practice is by virtue of the fact that the signatories undertook to declare that practice operative under the conventions themselves.”¹⁸⁶⁸

The argument from treaty law engages therefore not just the prohibition on the crime but also the articulation of its content. It goes beyond accepting that genocide is prohibited as a matter of international law because the Genocide Convention prohibits it—treaties are the source of most if not all international human rights norms in this regard¹⁸⁶⁹ to contend that the substantive definition of the crime is reflected in the treaty provisions and, in line with Part II of this Essay, that it is a definition to which courts must adhere in exercising universal jurisdiction. Again, I do not argue that the treaty provisions setting forth penal characteristics constitute themselves definitively the customary definitions of universal crimes; rather, these provisions make up strong evidence of what the customary definitions are. It follows too that definitions contained in legislation implementing domestically a state's treaty obligations or simply transposing onto domestic law the treaty's definitional provisions are particularly useful to courts since these domestic-law definitions reproduce, by their very nature, the substance of the conduct prohibited by the treaty.¹⁸⁷⁰ My model necessarily allows for some flexibility in the definitions of the crimes insofar as domestic legislation does not substantively alter the definition of the treaty provision it transforms into domestic law.¹⁸⁷¹ Even apart from obvious differences that will

¹⁸⁶⁸ D'AMATO, THE CONCEPT OF CUSTOM, *supra* note 59, at 123.

¹⁸⁶⁹ See D'Amato, The Concept of Human Rights, *supra* note 32, at 1128-48.

¹⁸⁷⁰ Of course, if the implementing legislation does not reproduce faithfully the crime as set forth in the treaty, the state would be in violation of its treaty obligations, and consequently, the definitions in the implementing legislation would not reflect the customary definitions of the crime (as set forth in the treaty).

¹⁸⁷¹

An example of an improper substantive alteration of a treaty definition is Germany's former Criminal Code § 220a, which translated the definition of genocide contained in the 1948 Genocide Convention into German law. Under the Convention's provisions, the act of genocide is defined as “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” The translation in § 220a criminalizes “inflict[ing] on the group conditions apt to bring about its physical destruction in whole or in part.” Kai Ambos & Steffen Wirth, *Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW* 769, 784-786 (Horst Fischer et al. eds., 2004) (emphasis in secondary source). Ambos and Wirth explain that the use of the word “apt” in the literal German translation “substantially changes the elements of the inflicting-destructive-conditions-[provision] of

result from translating the treaty provisions into different languages for purposes of domestic legislation, slight variations on the language are almost inevitable given the universal prescriptions of treaties as compared to the more state-specific prescriptions of domestic legislation.¹⁸⁷² Using positive international law as the starting point for determining the substance of universal crimes accommodates the modification of definitions through evolutions in customary law regarding the crimes while presently providing courts with harmonized and fairly precise definitions that safeguard, among other things, bedrock criminal law principles of legality, “namely, no crime without a law, no punishment without a law”¹⁸⁷³ in the context of international criminal law.¹⁸⁷⁴

genocide with respect to both the ordinary meaning and the travaux préparatoires of the Convention.” *Id.* at 786

¹⁸⁷² To take one example, the Montreal Convention, *supra* note 46, provides for the equivalent of universal jurisdiction over anyone who

unlawfully and intentionally:

places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight.

The U.S. implementing legislation, codified at 18 U.S.C. § 32(b)(3) (1996), similarly provides for jurisdiction over [w]hoever willfully --

places or causes to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy that aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight.

¹⁸⁷³ Bassiouni, *supra* note 42, at 45.

¹⁸⁷⁴ The history and development of international criminal law has relied on less stringent legality requirements than what might be found under domestic law. See Jordan J. Paust, *It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657, 664-671 (1997); Alfred P. Rubin, *Is International Criminal Law “Universal”?*, 2001 U. CHI. LEGAL F. 351, 357-363 (2001). Thus, so long as states do not expand the definitions of the crimes beyond their customary meanings, states may specify further the definitions of the crime as set forth in a treaty to comport with more stringent domestic legality requirements, as are typical in civil law, code-based systems. For instance, Germany's Code of Crimes Against International Law transforms the ICC crimes into domestic legislation. “Each crime was, however, reformulated into language consistent with German legal terminology, and to ensure that [sic], as required by the German Constitution, the crimes were clearly defined at the time of the commission of the act.” Steffen Wirth, *Germany's New International Crimes Code: Bringing a Case to Court*, 1 J. INT'L CRIM. JUST. 151, 153 (2003). The drafters of the ICC evidently were also concerned with specificity problems and therefore agreed to promulgate more specific “Elements of Crimes,” which are “non-binding guidelines for the Court, aids for application and interpretation designed to help judges and prosecutors as well as legal counsels appearing in cases before the Court.” Wiebke Riuckert & Georg Witschel, *Genocide and Crimes Against Humanity in the Elements of Crimes*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW*, *supra* note 68, at 61.

There is, however, a circularity problem. How can state practice change the customary definitions of universal crimes if states are legally constrained in their exercise of universal jurisdiction to use, as it were, the customary definitions “as they exist”? This circularity problem tends to afflict customary international law generally.¹⁸⁷⁵ The easy solution for our purposes would be for states to get together and simply change the definition of the crime through an amendment to the relevant treaty, or to create a new instrument relating to that crime. This process has taken place to some extent with respect to crimes spelled out in the statute for the newly-established International Criminal Court and to a lesser degree (since they are not treaties, strictly speaking) in the statutes of various international tribunals created under the auspices of the United Nations. For example, the Charter of the International Military Tribunal under which the Nazis were prosecuted defined crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations....”,¹⁸⁷⁶ Although acts such as torture, imprisonment, and rape could potentially fall into the “other inhumane acts” receptacle, they are not set forth explicitly in the Charter and courts using its definitional provisions therefore would be on more precarious ground prosecuting these crimes as universal crimes against humanity than in prosecuting a listed offense such as “extermination” or “enslavement.” Yet by the end of the last century, international law evolved such that the statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the ICC Statute, do affirmatively list torture, imprisonment and rape as crimes against humanity,¹⁸⁷⁷ thus clarifying or perhaps adding to the customary definitions of crimes against humanity and, in any event, providing courts with firmer prosecutorial footing as to certain of these

¹⁸⁷⁵ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporters' note 2 (1987).

¹⁸⁷⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

¹⁸⁷⁷ Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, at art. 5, U.N. SCOR, 48th Sess., 3217th mtg., U.N.Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, at art. 3, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court, art. 7, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter ICC statute].

crimes. Judicial opinions also may contribute to the development or clarification of the definitions under customary law. For example, although the Genocide Convention nowhere explicitly mentions rape in its list of acts that may qualify as genocide when “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,”¹⁸⁷⁸ international criminal tribunal judgments make clear that acts constituting genocide encompass acts of rape committed with the requisite *mens rea*.¹⁸⁷⁹

But all these examples are of legal developments engineered by quintessentially international agreements or institutions. More difficult is the question of when and how national courts advance customary law in domestic proceedings that apply international law, including, naturally, exercises of universal jurisdiction. We can say, for instance, that if the consistent and widespread practice of states prosecuting the international crime of genocide deems intent to destroy a group based on its political self-identification to satisfy the *mens rea* component of the crime, the customary definition of genocide has expanded to include within its victim class political groups along with the national, ethnic and racial groups carved out by the Genocide Convention. But the first state to extend the definition in this way violates customary law by improperly asserting jurisdiction over a crime that-at that moment-prescriptively does not qualify as universal.¹⁸⁸⁰ Yet customary law's recursive constitution may immediately reduce the illegality of that act if interested states say, the alleged universal criminal's state of national citizenship and/or the state on whose territory the crime occurred-acquiesce in or approve of the universal jurisdictional assertion.¹⁸⁸¹ And particularly if other states then prosecute genocide in a way that recognizes political groups as

¹⁸⁷⁸ Convention on the Prevention and Punishment of the Crime of Genocide art. 11, Dec. 9, 1948, 78 U.N.T.S. 277.

¹⁸⁷⁹ See *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, ¶ 53 (Dec. 6, 1999); *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, ¶ 117 (May 21, 1999); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 507-08 (Sept. 2, 1998).

¹⁸⁸⁰ This especially would be the case in this example because including political groups in this victim classification was debated and rejected in the drafting of the Genocide Convention. For a history of the drafting debate on this issue see Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L. J. 2259, 2262-2269 (1997).

¹⁸⁸¹ I discuss this point in more detail, see Part IV, *infra*.

victims, the first state's illegal act will have planted a customary "seed,"¹⁸⁸² the cultivation of which, by state practice, will have modified the customary definition of genocide. The possibility of custom evolving beyond treaty definitions was even expressly built into the ICC Statute.¹⁸⁸³

Evolutions in custom likewise may alter and even expand the capacity of states to allow procedurally for universal adjudicative jurisdiction over the perpetrators of international crimes. For instance, while like the Torture Convention, a number of positive instruments dealing with universal crimes provide for extraterritorial and extra-national jurisdiction by state courts over alleged offenders (the conventional equivalent of universal adjudicative jurisdiction), the Genocide Convention does not. In fact, extraterritorial jurisdiction was explicitly rejected in the Convention's drafting.¹⁸⁸⁴ Thus to accept genocide as a universal crime, one must view custom as having expanded the adjudicative scope of jurisdiction as to genocide beyond that envisaged by the treaty to encompass the jurisdiction of all states, irrespective of the place of the crime.

But again, my focus here is on prescriptive jurisdiction, or the substance of the universal crime under international law. Because, as we have seen, treaties furnish neither definitive nor exhaustive definitions of universal crimes due to the organic nature of customary law, courts may not always be obliged to use the precise definitional language of the treaty when exercising universal jurisdiction, though it will often be the case that the treaty definition is the best-not to mention the most readily available-evidence of custom. In fact, the practice of universal jurisdiction evidences this latter point.

¹⁸⁸² Anthony D'Amato, *The Theory Of Customary International Law*, 82 AM. SOC'Y INT'L L. PROC. 242, 246 (1988); D'Amato, *Is International Law Really "Law"?*, supra note 32, at 1310- II; D'AMATO, *THE CONCEPT OF CUSTOM*, supra note 59, at 97-98.

¹⁸⁸³ Rome Statute of the International Criminal Court, art. 10, U.N. Doc. A/CONF. 183/9 (July 17, 1998) ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."). For a detailed analysis of Article 10, see Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909 (2000).

¹⁸⁸⁴ For a detailed and persuasive explanation of this point, see REYDAMS, supra note 41, at 48-53.

To begin with, states' domestic laws facilitating universal jurisdiction flow routinely from the criminalization of the conduct in question at the level of international conventional law. These domestic laws may, for instance, fulfill a state's obligations under a treaty and thus, either through specific implementing legislation (typical in common law countries) or general enabling clauses making the treaty provisions directly applicable (typical in civil law countries),¹⁸⁸⁵ translate into national law the international substance of the crime for courts to prosecute. Prevalent examples include domestic legislation regarding the Torture Convention,¹⁸⁸⁶ the Genocide Convention,¹⁸⁸⁷ and the Geneva Conventions

¹⁸⁸⁵ For example, Austria's criminal code provision providing for universal jurisdiction states that extraterritorial, extra-national jurisdiction applies to "criminal offences, if Austria is under an obligation to prosecute them-even if committed abroad-irrespective of the penal law of the State where they were committed." Strafgesetzbuch [StGB] [Penal Code] §64(1)(6) (Austria), translated in REYDAMS, supra note 40, at 94. "The term 'obligation' in §64(1) subparagraph 6 refers to a treaty obligation." REYDAMS, supra note 40, at 97. Another example is Belgium's Code de procedure pénale, titre préliminaire, article 12 bis, which has a general enabling clause that reads: "The Belgian courts are competent to take cognizance of offences committed outside the territory of the Kingdom that are the object of an international convention binding on Belgium if the convention obliges in any way to submit the case to the competent authorities for the purpose of prosecution." REYDAMS, supra note 40, at 105. Likewise, Denmark's Straffeloven [Strfl] § 8(1)(5) (Denmark), provides: "Acts committed outside the territory of the Danish State, shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator where the act is covered by an international convention in pursuance of which Denmark is under an obligation to start legal proceedings." REYDAMS, supra note 40, at 127. An enabling provision appears also in France's criminal code with respect to self-executing treaties. REYDAMS, supra note 40, at 132-33. Somewhat of a departure from this model, the German code, StGB, supra, § 6, "Offences Against Internationally Protected Interests or Rights" lists international crimes over which universal jurisdiction exists-all of which, except for one, are directly the subject of an international treaty-and provides a catch-all provision that provides jurisdiction over "acts that are to be prosecuted by the terms of an international treaty binding on the federal republic of Germany even if they are committed outside the country." REYDAMS, supra note 40, at 142. Spain's Ley Orgánica del Poder Judicial, article 23.4 follows this model as well, listing offenses prohibited under conventional international law, and providing also for jurisdiction over "any other offence which Spain is obliged to prosecute under an international treaty or convention." REYDAMS, supra note 40, at 183. The Netherlands' 2003 International Crimes Act, which amended the Wartime Offenses Act and implements in part the ICC Statute, likewise draws from treaty law to define the offenses over which it provides universal jurisdiction, namely, genocide, crimes against humanity, torture and grave breaches (and even non-grave breaches) of the Geneva Conventions and their Additional Protocol I. See International Crimes Act of 19 June 2003, English version available at <http://www.icrc.org/ihl-nat.nsf/0/fb9070f8fc60c047c1256da30032f0b0?OpenDocument>.

¹⁸⁸⁶ See Australia's Crimes (Torture) Act, 1988, translated in REYDAMS supra note 40, at 89-90; Uitvoeringswet Folteringsverdrag [The Netherlands' Act Implementing the Torture Convention], id. at 167-69.

¹⁸⁸⁷ See Israel's Crime of Genocide (Prevention and Punishment) Law 1950, see REYDAMS, supra note 40, at 160; Switzerland's Code pénal Suisse, titre I2bis, Offences Against the Interests of the International Community, id. at 195.

and their Additional Protocol I¹⁸⁸⁸ -this latter legislation has, in a number of states, been substituted for by legislation implementing the newly established ICC.¹⁸⁸⁹ Some legislation expressly declares its purpose in this regard. The since-tamed Belgian War Crimes Act,¹⁸⁹⁰ under which Belgian courts have prosecuted a number of Rwandan war criminals for acts committed in Rwanda against Rwandans,¹⁸⁹¹ had as its purpose “to define three categories of grave breaches of humanitarian law and to integrate them into the Belgian domestic legal order.”¹⁸⁹² In fact, “[t]o remain consistent with the definitions used in international law, the Act textually refers to the wording of the relevant provisions of the international conventions.”¹⁸⁹³ And its definitional provisions even

¹⁸⁸⁸ See Australia's Geneva Conventions Act 1957, translated in REYDAMS *supra* note 40, at 87-88; Belgium's War Crimes Act, which goes beyond the conventional law to add conduct from Additional Protocol II (non-grave-breaches), and subsequently was amended to add genocide and crimes against humanity, *id.* at 106-107, but implementation of the law has been substantially restricted through amendment due to international pressure, see *supra* note 1; Canada's Geneva Conventions Act, REYDAMS *supra* note 40, at 120; the Netherlands' Crimes in Wartime Act, *id.* at 167; Switzerland's Code penal militaire, articles 9(1) and 109(1) and Code penal Suisse, article 6bis, *id.* at 195-196.

¹⁸⁸⁹ See Australia's International Criminal Court Act 2002, REYDAMS, *supra* note 40, at 88- 89; Canada's Crimes Against Humanity and War Crimes Act which “incorporates the provisions of the ICC Statute into Canadian legislation,” *id.* at 122-124; Germany's Code of Crimes Against International Law, “which makes the core ICC crimes offences under domestic law,” *id.* at 144; the United Kingdom's International Criminal Court Act 2001, which limits universal jurisdiction to foreigners either resident when the offense was committed, or subsequently become resident and reside in the U.K. at the time proceedings are brought, *id.* at 206. See REYDAMS, *supra* note 40, at Part II: Universal Jurisdiction in Municipal Law (discussing the exercise of universal jurisdiction by fourteen states). For specific examples, see pg. 87-90 (Australia), 97 (Austria), 105-07 (Belgium), 120-24 (Canada), 127 (Denmark), 132-34 (France), 142-46 (Germany), 159 (Israel), 165-69 (the Netherlands), 183-84 (Spain), 193-96 (Switzerland), 204-06 (United Kingdom).

¹⁸⁹⁰ See Ratner, *supra* note 9.

¹⁸⁹¹ See Luc Reydam, Belgium's First Application of Universal Jurisdiction: The Butare Four Case, 1 J. INT'L CRIM. JUST. 428 (2003). Some of these convictions are problematic under international law. For example, as Reydam points out:

Some of the war crimes of which one of the defendants, Higaniro, was convicted took place when there was no armed conflict at all in Rwanda. The two incendiary reports attributed to him dated from late 1993 and early 1994. Contrary to the prosecutor's assertion, there was no armed conflict in Rwanda between 4 August 1993 (date of the Arusha Peace Accords) and 6 April 1994. While sporadic violent incidents took place during this period they did not reach the threshold of application of the 1949 Geneva Conventions and Additional Protocol II.

Id. at 435.

¹⁸⁹² Stefaan Smis & Kim Van der Borgh, Introductory Note to Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 38 I.L.M. 918, 919 (1999).

¹⁸⁹³ *Id.*

explicitly invoke the relevant conventions by name; for example, the Act sets forth the definition of genocide after stating that the crime is defined “[i]n accordance with the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.”¹⁸⁹⁴

As a result of this legislative translation of international law into national law, the practice of courts has been to use positive international law (as reflected in national law) to define the subject universal offense when exercising universal jurisdiction. To take one of the earliest and most well-known examples of universal jurisdiction, the definitions of “war crimes” and “crimes against humanity” contained in the Nazi and Nazi Collaborators (Punishment) Law under which the Israeli Supreme Court convicted Nazi war criminal Adolf Eichmann for acts which were-leaving no doubt as to the universal basis of the jurisdiction committed before Israel was even a state, embodied the definitions of the respective crimes in the Nuremberg Charter.¹⁸⁹⁵ The Israeli Supreme Court

¹⁸⁹⁴ Id. at art. 1, § 1. Although the Act formally adopts the prescriptive definitions of the crimes from conventional law, like the Netherlands' International Crimes Act it went beyond conventional law regarding the adjudicative availability of universal jurisdiction over “grave breaches” by including within this category acts that were not committed as part of an international conflict. Smis and Van der Borgh explain that

contrary to the Geneva law, the Belgian Act does not make a distinction between international and non-international conflicts for the purposes of defining grave breaches. In fact, pursuant to [the Conventions], the term “grave breaches” is only applicable to international armed conflicts. The violations of humanitarian law in non-international armed conflicts (Additional Protocol II) do not fall within the ambit of the [legislative] undertaking referred to in [connection with grave breaches]. However, considering the number of violations of international humanitarian law that are committed in non-international conflicts, the Belgian legislator found it wise to extend the application of “grave breaches” to violations of the laws of war committed during internal conflicts.

Id. at 920.

¹⁸⁹⁵ The Nazi and Nazi Collaborators (Punishment) Law defines the crimes as “crime against humanity” means any of the following acts:

murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;

“war crime” means any of the following acts:

murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

justified its competence to judge Eichmann on the grounds that “international law [enforces itself] by authorizing the countries of the world to mete out punishment for the violation of its provisions, which is effected by putting these provisions into operation either directly or by virtue of municipal legislation which has adopted and integrated them.”¹⁸⁹⁶ Quoting the Nuremberg Tribunal, the Court observed that “the Charter, with all the principles embodied in it-including that of individual responsibility-must be seen as ‘the expression of international law existing at the time of its creation; and to that extent (the Charter) is itself a contribution to international law.’”¹⁸⁹⁷ The Charter had, in the words of the Court, “formed part of the customary law of nations.”¹⁸⁹⁸ Consequently, through the enactment of the law, the Israeli legislature “gave effect to international law and its objectives.”¹⁸⁹⁹ The United States endorsed universal jurisdiction over these precise crimes-as defined under Israeli law-when it subsequently extradited another war criminal, John Demjanjuk, to Israel for prosecution in connection with crimes he had allegedly committed as a World War II concentration camp guard.¹⁹⁰⁰ Ruling the extradition legal under national and international law, the Court of Appeals for the Sixth Circuit examined the definitions of the crimes contained in the Israeli law

Demjanjuk v. Petrovsky, 776 F.2d 571, 579 (6th Cir. 1985) (quoting the The Nazi and Nazi Collaborators (Punishment) Law). The Nuremberg Charter defines the crimes as:

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds.... Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, arts. 6(b), 6(c), Aug. 8, 1945, E.A.S. No. 472, 82 U.N.T.S. 280.

¹⁸⁹⁶ Judgment reproduced in English, 2 LEON FRIEDMAN, THE LAW OF WAR 1664 (Fred L. Israel & William Hansen eds., 1972).

¹⁸⁹⁷ Id. at 1666 (quoting I.M.T. (1947), vol. 1, 218).

¹⁸⁹⁸ Id. at 1667.

¹⁸⁹⁹ Id. at 1668.

¹⁹⁰⁰ Demjanjuk was later acquitted by the Israeli Supreme Court on these specific charges due to flaws in the documents identifying him as “Ivan the terrible,” the guard against which the charges were directed. Based on evidence that he was nonetheless a concentration camp guard, Demjanjuk's legal battles continue. For a summary see Nathan Guttman, Demjanjuk To Appeal US Decision To Deport Him, JERUSALEM POST, Dec. 30, 2005, at 5.

and held that Israel had universal jurisdiction over war crimes and crimes against humanity.¹⁹⁰¹ More recently, France's Court of Cassation found jurisdiction over a Rwandan national for crimes committed in Rwanda during that country's civil war based on France's domestic legislation implementing the Torture Convention, and despite the fact that Rwanda was not party to the Convention.¹⁹⁰² The Court held that French courts were competent to "judge persons who could be guilty, in a foreign country, of tortures," under the Torture Convention's definition of the crime,¹⁹⁰³ which is incorporated by reference into the French Penal Code through article 689-2 of the Penal Procedures Code.¹⁹⁰⁴ Furthermore, courts also use the decisions and judgments of international tribunals to inform their application of international law. For example, in convicting on universal jurisdiction grounds Adolfo Scilingo, an Argentine naval captain, for his involvement in "death flights" during Argentina's military rule from 1976-1983, Spain's Audiencia Nacional drew from the case law of the ICTY and the text of the ICC to specify, among other things, the elements of crimes against humanity under international law, the character of the civilian population against which the crimes must be directed, the generalized and systematic nature of the crimes, and issues of command responsibility.¹⁹⁰⁵

¹⁹⁰¹ Demjanjuk v. Petrovsky, 776 F.2d 571, 582-583 (6th Cir. 1985).

¹⁹⁰² See United Nations, Status of ratification of the Convention against Torture, <http://www.ohchr.org/english/law/cat-ratify.htm> (last visited Dec. 21, 2005).

¹⁹⁰³ Cour de Cassation [Cass. Crim] [highest court of ordinary jurisdiction], Jan. 6, 1998. Nr. X 96-82.491 Pf. Nr. Y 96-82.492, translated in I YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 598, 599 (Horst Fischer, et al. eds., 1998).

¹⁹⁰⁴ Article 689-2 reads:

Whoever, outside the territory of the Republic, commits acts qualified as a felony or delict, which constitute torture within the meaning of the first article of the convention against torture and other cruel, inhumane, or degrading penalties or treatment, adopted in New York on December 10, 1984, may be prosecuted and tried by French courts if he is found in France.

C. PR. PEN. art. 689-2 (Fr.), translated in THE AMERICAN SERIES OF FOREIGN PENAL CODES: 29 THE FRENCH CODE OF CRIMINAL PROCEDURE 294 (Edward M. Wise, ed., Gerald L. Kock & Richard S. Frase trans., 1988) (1964).

¹⁹⁰⁵ American Society of International Law, International Law in Brief, Audiencia Nacional of Spain: Sentence for Crimes Against Humanity in the Case of Adolfo Scilingo (April 19, 2005), available at <http://www.asil.org/ilib/2005/04/ilib050426.htm#j3>.

Where legislatures or courts depart from the treaties, however, they are obliged to undertake a rigorous and bonafide inquiry into the status of customary law to justify the definition they employ. But doesn't this divination of custom just bring us right back to the initial concern of courts subjectively defining universal crimes, leading to the legally unjustified harassment of high-profile individuals for purely political or sensationalist motives? These claims might stick if the real-world practice of courts exercising universal jurisdiction wantonly flouted the legal strictures imposed by universal jurisdiction's prescriptive limits. But in fact the reported cases of universal jurisdiction reveal that courts by and large apply faithfully and responsibly the international legal definitions of universal crimes as evidenced in positive international law.¹⁹⁰⁶ Where courts do not-and have no international legal argument to support their deviation-their violation of international law is readily apparent, and perhaps most importantly, interested states have a strong legal basis to reject such claims.

For instance, under this Essay's analysis, Spain's Audiencia Nacional defied international law when it upheld jurisdiction over former Chilean dictator Augusto Pinochet for genocide based on crimes allegedly committed against a "national group" by stretching this victim class designation beyond its customary definition to include "a national human group, a differentiated human group, characterized by some trait, and integrated into the larger collectivity.,¹⁹⁰⁷ Finding that the acts alleged constituted genocide since they were designed "to destroy a differentiated national group" of political opponents irrespective of their nationalities, i.e., "those who did not fit in [Pinochet's] project of national reorganization... [whether] Chileans or foreigners,"¹⁹⁰⁸ the court effectively (and none-too-subtly) amended the victim groups within the definition of genocide. The court's own conclusory reasoning bespeaks the lack of legal support for its

¹⁹⁰⁶ For a comprehensive cataloging with summaries of exercises of universal jurisdiction in municipal courts, see REYDAMS, *UNIVERSAL JURISDICTION*, supra note 40, at 81-226.

¹⁹⁰⁷ Quoting the English translation in *THE PINOCHET PAPERS*, supra note 19, at 103.

¹⁹⁰⁸ *Id.* at 103-04.

position;¹⁹⁰⁹ genocide has been defined consistently since the 1948 Genocide Convention in the statutes of international courts and treaties to have as victim groups only a “national, ethnical, racial or religious group, as such.”¹⁹¹⁰ In the words of the ICTR, “a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship.”¹⁹¹¹ The Audiencia's sprawling construction eviscerates the “as such” qualifier¹⁹¹² and defacto enlarges the class of victims to include potentially any group whatsoever—including, as in the case before it, political groups, which had been explicitly rejected as victims in the drafting of the Genocide Convention.¹⁹¹³ In short, the ruling clashes with one of the more recognizable legal demarcations of the crime of genocide under international law.

In sum, and as the Audiencia's exaggerated ruling shows, positive law articulates not just the substance of universal crimes but also a clear benchmark against which illicit overreaching may be measured. Where such overreaching occurs, the rulings conflict with international law and the exercise of universal jurisdiction is illegitimate. Interested states therefore have a solid legal basis to oppose the

¹⁹⁰⁹ Id. at 100. The court's argument relies principally on the former Spanish legislation in place when the acts allegedly were committed, under which the intent element of genocide encompassed intent to totally or partially destroy a “national ethnic, religious or social group,” id. At 27, 100 (emphasis added), and which was therefore in clear departure from Article 1 of the Genocide Convention which prescribed intent to destroy, in whole or in part, a “national, ethnical, racial or religious group, as such.” See Appendix C, *infra*.

¹⁹¹⁰ See ICTY Statute, *supra* note 74, at art. 4; ICTR Statute, *supra* note 74, at art. 6; ICC Statute, *supra* note 74, at art. 6.

¹⁹¹¹ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 512 (Sept. 2, 1998). Notably, the jurisprudence of the ICTR has abandoned the notion expressed in the Tribunal's first finding of genocide in *Akayesu*, at ¶ 516, that the victim class could include “any stable and permanent group”—a definition that would nonetheless still exclude the wholly political group found to be victims in the Audiencia's ruling. Subsequent rulings have determined that the victims of the Rwandan genocide, the Tutsi, were indeed an ethnic group within the meaning of the Statute. *Prosecutor v. Musema*, Case No. ICTR-96-13-A ¶ 934 (Jan. 27, 2000); *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶ 95, 98 (May 21, 1999). For an explanation of why the *Akayesu* ruling extending the victim class to “stable and permanent groups” based on the travaux préparatoires of the Genocide Convention was wrong, and why the Tutsi constituted a protected class under the correct definition in any event, see William A. Schabas, *The Crime of Genocide in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW* 447, 450-456 (Horst Fischer et al. eds., 2001).

¹⁹¹² The “as such” language was added to “implicitly include” a specific motive. Schabas, *supra* note 108, at 458.

¹⁹¹³ See discussion, *supra* note 77.

exercise of universal jurisdiction in such circumstances. For instance, had the charges concerning Pinochet's extradition from Great Britain—which had arrested the former dictator pursuant to Spain's request—relied on Spanish allegations of genocide (instead of torture, which ended up being the relevant crime of extradition),¹⁹¹⁴ Chile would have been perfectly justified in protesting the legality of Spain's jurisdiction under international law on the grounds that the basis for jurisdiction—that is, genocide as defined by the Audiencia's ruling—was faulty.¹⁹¹⁵ The idea of states successfully objecting to the legality of universal jurisdictional assertions is not farfetched: Congo successfully obtained a World Court ruling invalidating a Belgian claim of universal jurisdiction over Congo's then-Minister of Foreign Affairs on grounds of sovereign immunity,¹⁹¹⁶ which resulted in Belgium's repeal of the arrest warrant.¹⁹¹⁷ Indeed, Chile actively considered bringing the Pinochet case to the World Court based on its objections that Pinochet enjoyed immunity¹⁹¹⁸ (the case was, for practical purposes, resolved when British Secretary of State Jack Straw allowed Pinochet to return to Chile on medical grounds).¹⁹¹⁹ The legal argument presented here would have been another arrow in Chile's quiver of legal objections to Spanish jurisdiction, and quite a sharp one at that. And although it is certainly the most formal avenue, taking the case to the World Court is by no means the only option among the panoply of mechanisms by which states may express their legal objections and

¹⁹¹⁴ See THE PINOCHET PAPERS, *supra* note 19, at 268.

¹⁹¹⁵ As it turns out, Chile did protest the legality of the jurisdiction, but on grounds of diplomatic and sovereign immunity. See Susan Cornwell, Chilean Visitors Find Pinochet Looking Well, WASH. POST, Nov. 16, 1998, at A19; Laurie Goering, Chile's Response to Pinochet Arrest A Gauge of Progress, CHI. TRIB., Oct. 21, 1998, at 4; World/Nation Briefs, NEWSDAY, Nov. 7, 1998, at A 12.

¹⁹¹⁶ Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14).

¹⁹¹⁷ See REYDAMS, *supra* note 40, at 116.

¹⁹¹⁸ See Goering, *supra* note 112; Ray Moseley, Chile Will Ask World Court to Intervene for Pinochet; Ex-Dictator Fighting Extradition to Spain, CHI. TRIB., Sept. 29, 1999, at 6.

¹⁹¹⁹ Statement of Secretary of State Jack Straw in the House of Commons, March 2, 2000, reproduced in THE PINOCHET PAPERS, *supra* note 19, at 481.

attempt to protect their legal rights or “entitlements” under international law,¹⁹²⁰ entitlements such as jurisdictional authority over territory and nationals.

14.9.3 Evolving and Enforcing the Limits of Universal Jurisdiction

So far this Essay has argued that universal jurisdiction is a customary law which, like all customary law, may evolve by violations that gain acceptance and eventually come to reflect a new consensus of state practice and *opinio juris*. But it has also argued that the treaty-based definitions of universal crimes best evidence custom, and accordingly constrain the legitimate exercise of universal jurisdiction by courts. The tension in these arguments raises perhaps one last question worth addressing: How can we tell whether a violation of international law resulting from a court's expansion of the treaty definition of a universal crime (a) signals a possible shift in customary law, or (b) represents an enduring breach of that law? In other words, how are the legal limits of universal jurisdiction enforced?

Framed broadly, the question of violations blossoming into custom is endemic to all customary law,¹⁹²¹ but in this particular circumstance the proper legal analysis may not be too difficult to discern. The answer lies in the reactions of other jurisdictionally-interested-i.e., national and territorial-states. The protest and acquiescence of states to what amounts to an international legal claim by another state has long been held to be a constitutive element of custom.¹⁹²² And a claim of authority to prescribe and adjudicate foreign conduct by foreign nationals under a theory of universal jurisdiction is as clear an international legal claim as any. Particularly important to the customary calculus are the reactions of states that have a substantial legal interest in the claim at issue, that is, states

¹⁹²⁰ D'Amato, *Is International Law Really Law?*, *supra* note 32, at 1304-07 (describing legal rights as “entitlements” and applying the terminology to international law); *id.* at 1310-1313 (explaining how countermeasures enforce international law).

¹⁹²¹ See *supra* text accompanying note 78.

¹⁹²² See Akehurst, *supra* note 62, at 38-42 (and cases cited therein).

whose legal rights or entitlements are directly implicated by the claim.¹⁹²³ In comparison to other areas of international law where it may be hard to identify and measure the various interests of various states implicated by a given claim,¹⁹²⁴ the universal jurisdiction scenario presents a relatively clear picture of the interested states and the degree of their interests. The legally interested states are those states that otherwise would have jurisdiction over the acts and persons involved; they are those states whose nationals are the subject of the universal jurisdiction claim and/or whose territories suffered the alleged conduct giving rise to universal jurisdiction.

Accordingly, where a court asserting universal jurisdiction expands the definition of the crime upon which it grounds its competence beyond the crime's customary definition—a definition evidenced largely by treaty law—the reactions of national and territorial states determine the customary status of the universal jurisdiction court's definitional expansion.¹⁹²⁵ As we have seen, these states may take a number of measures to repudiate the legality of the universal jurisdiction state's claim; they may, for instance, officially protest,¹⁹²⁶ take the case to the World

¹⁹²³ *Id.* at 40

(If an act affects the interests of only one State, protest by that State will carry great weight... [and] [t]he extent to which a State's interests are affected varies according to the nature of the act concerned. Failure to protest against an assertion in *abstracto* about the content of customary law is less significant than failure to protest against concrete action taken by a State in a specific case which has an immediate impact on the interests of another State.).

¹⁹²⁴ See *id.*

¹⁹²⁵ A non-interested state may try to insulate itself from the definitional expansion of a universal crime by invoking the persistent objector doctrine of international law, which holds that “a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987). However, “[h]istorically, such dissent and consequent exemption from a principle that became general customary law has been rare.” *Id.*; see also Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985) (observing that while historically rarely invoked, the principle may play a more instrumental role in modern international lawmaking that occurs through institutional organs such as the United Nations).

¹⁹²⁶ The contribution of protest alone unaccompanied by some tangible response as a constitutive element of custom is the subject of some controversy. See Akehurst, *supra* note 63, at 40-41 (disagreeing with D'Amato's view that unaccompanied protests are not enough to block a new rule); R.A. Mullerson, *New Thinking by Soviet Scholars: Sources of International Law*, 83 AM. J. INT'L L. 494, 506-07 (1989). In cases of universal jurisdiction, the protest will almost inevitably be accompanied by some form of response, whether it is a suit against the state asserting universal jurisdiction or simply a refusal to extradite.

Court and, naturally, if the universal jurisdiction is asserted in absentia,¹⁹²⁷ refuse to extradite the accused. To enforce the definitional limits of the crime under customary law therefore, states objecting to universal jurisdiction on the grounds set forth above would be well-advised to make explicit their rejection of the universal jurisdiction court's illegitimate definitional expansion upon which the court purports to base its competence.

Consequently, the potential for evolving-or not-the definitions of universal crimes by the process of customary law-violation-turned new custom rests not with the state asserting universal jurisdiction, but instead most often with the states whose nationals are in the dock. Where interested states object to the universal jurisdiction assertion by rejecting an illegitimate definitional expansion of the crime that purports to justify the universal jurisdiction court's competence, the court's violation represents an enduring breach of international law. In other words, the objection to jurisdiction effectively blocks a potential shift in customary law as to the definition of the crime. However, if interested states approve of or acquiesce in the court's definitional expansion of the crime, such approval or acquiescence may signal a possible customary shift regarding the definition of the crime in line with the definition adjudicated by the court. Hence if the Pinochet extradition had taken place, and if the Spanish courts had rested their jurisdiction on the universal crime of genocide using their exorbitant definition of the crime-which we know is exorbitant because we can measure it objectively against the treaty definition-Chile would determine, either by approval or rejection of Spanish jurisdiction based on this definition, the potential for a customary definitional expansion of genocide as contrived by the Spanish courts. It should be emphasized that even were Chile to approve of the exorbitant definition and the

¹⁹²⁷ The status of universal jurisdiction in absentia is not yet clear under international law. See Colangelo, *supra* note 3, at 548-49

(Universal jurisdiction in absentia is presently caught in a customary twilight that will witness either the development or the dismissal of the practice depending on the actions and reactions of states in the next part of this century. State practice has not yet worn into the fabric of international law an affirmative custom of universal jurisdiction in absentia assertions. At the same time, however, an incipient trend supporting this type of assertion is emerging, and those who take a permissive view of international law might legitimately submit that custom does not explicitly prohibit universal jurisdiction in absentia.) (internal citations omitted).

resulting universal jurisdiction, Spain's jurisdiction would still conflict with international law; one territorial or national state's approval of or acquiescence in a definitional expansion would not be enough to change the customary definition of the crime,¹⁹²⁸ especially against the backdrop of a widely-ratified and longstanding treaty to the contrary.

CONCLUSION

The purpose of this Essay has been to explicate a basic but over looked legal feature of universal jurisdiction: If national courts prosecute on grounds of universal jurisdiction, they must use the international legal definitions-as derived from customary law-of the universal crimes they adjudicate. The Essay further has attempted to explain the best way of going about determining what those definitions are, by looking to the provisions of widely-ratified and longstanding international treaties. An important implication of this conclusion addresses concerns that universal jurisdiction hazards unbridled abuse for purely political and sensationalist ends. As I hope to have shown, the international law in this area does not permit such abuse; rather, it prescribes legal limits of universal jurisdiction. These limits are enforced not by those states exercising universal jurisdiction, but principally by those states whose nationals are the subject of foreign universal jurisdiction proceedings. Indeed, should states come to recognize this Essay's thesis, the near future may very well see precisely this type of legal argument being made where universal jurisdiction claims are in dispute.

¹⁹²⁸ A basic definition of the hard-to-pin-down threshold for determining the existence of customary law appears in the Restatement, which states that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (emphasis added). Whatever view one takes of how much practice achieves the threshold level of generality and consistency necessary to form customary law, one improper assertion of universal jurisdiction accepted as legitimate by an interested state and in the face of a treaty to the contrary would not meet that test.

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